No. 15395

United States Court of Appeals

for the Ninth Circuit

MILTON E. DAM and EVERETT S. DAM, Co-partners Doing Business Under the Firm Name and Style of DAM BROTHERS,

Appellants.

vs.

GENERAL ELECTRIC COMPANY, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Eastern District of Washington Northern Division.

FILED

APR 24 1957

PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-19-57

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In the United States District Court, Eastern District of the State of Washington, Northern Division, Spokane, Washington

No. 1036

MILTON E. DAM and EVERETT S. DAM, Co-Partners Doing Business Under the Firm Name and Style of DAM BROTHERS,

Plaintiffs,

vs.

GENERAL ELECTRIC COMPANY, a Foreign Corporation; AMERICAN POWER & LIGHT COMPANY, a Foreign Corporation; ELECTRIC BOND & SHARE COMPANY, a Foreign Corporation,

Defendants.

COMPLAINT

Come now the plaintiffs, Milton E. Dam and Everett S. Dam and for cause of action against the above defendants complain and allege as follows:

I.

That the Federal District Court obtains original jurisdiction in this case by reason of Federal Statute, 28 U.S.C.A. Pr. 1332, in that the parties have a diversity of citizenship and the amount involved exceeds the sum of Three Thousand ($3,000.00) Dollars, exclusive of interests and costs.

II.

That at all times hereinafter mentioned the Plaintiffs Milton E. Dam and Everett S. Dam were and

now are partners doing business under the firm name and style of Dam Brothers, formed in 1905, at Seattle, Washington. [1*]

III.

That the Defendant, General Electric Company, is a corporation incorporated under and by virtue of the laws of the State of New York, April 15, 1892, with its principal place of business in Schenectady, New York. That it is doing business in the State of Washington.

IV.

That the Defendant, American Power & Light Company, is a corporation incorporated under and by virtue of the laws of the State of Maine, September 20, 1909, with its principal place of business in New York City, New York. That it is doing business in the State of Washington.

That the American Power & Light Company owns all the common stock of its dummy holding company, the Washington Irrigation & Development Company, a Washington Company, with a legal office registered for the State of Washington, at Vancouver, Washington.

V.

That the Defendant, Electric Bond & Share Company, is a corporation incorporated under and by virtue of the laws of the State of New York, February 27, 1905, with its principal place of business in New York City, New York. [2]

*Page numbering appearing at foot of page of original Certified Transcript of Record.

VI.

Dam Brothers

That Dam Brothers had been interested and active in the early irrigation and land development in the Columbia River Basin area during the 1890's. Becoming actively interested in the undeveloped valley on the Columbia River at Priest Rapids, where they had practical ideas for the irrigation and power development of their proposed project. By the spring of 1913 they had completed sufficient engineering and investigations, employing some of the Nation's most able and well-known engineers and experts, which determined the feasibility of plans for the construction of the irrigation and power development works for the valley. Constituting the large level body of land adjacent to and lying between the Columbia River and the Saddle Mountains at Priest Rapids, named by them "The Priest Rapids Highlands," comprising about 135,000 Acres of the highest quality irrigable lands in the state.

VII.

That the Dam Brothers had acquired and controlled a large acreage of the raw sagebrush land which would be irrigated by their Land, Irrigation and Power Project, "The Priest Rapids Highlands Project."

VIII.

That they organized the Priest Rapids Landowners Association, of the privately owned lands, up-

wards of One Thousand in number, which repre sented about fifty per cent of the total acreage c the project.

IX.

That the Dam Brothers undertook and accon plished necessary and favorable changes in th Washington State Irrigation District laws durin the winter sessions of the 1911 and 1913 State Legis lature, for their proposed project at Priest [3 Rapids.

X.

That the plaintiffs helped obtain large appropria tions from the Washington State legislature for th State Geologist in order for the State to receiv matching funds from the United States Governmer for geological surveys in the State of Washingtor Which survey included the first topographical map covering the Priest Rapids area. Furnishing defend ants copies of advanced sheets of the 25-foot contou maps, long before publication of the valuable eng neering data.

XI.

That the Dam Brothers engineering and invest gations included every phase of their land, powe and irrigation development, for a practical, moder and successful development. Not only the prelim naries and construction, but for the developmer and production of the lands, with studies and plan covering scientific crop growing for the long mil climate on the Priest Rapids Highlands. The stud and plans for industrializing the crops, processin

lants and marketing, etc. With introduction of the rst mechanized equipment for irrigation farming.

XII.

That the Dam Brothers had worked out the transortation system for the Priest Rapids Highlands, ncluding construction of the Chicago, Milwaukee St. Paul Railroad to the valley, with electrified eeders covering the Highlands. Construction of an xtension of the telephone and telegraph lines from Beverly and Yakima to the valley and the all-electric ity to be built at the dam.

XIII.

That the Dam Brothers had interested financially, riends and interests who were ready to colonize the irplus lands with experienced and financially able armers who desired the mild climate, high-class nd and the many attractive features in prospect or the general development of the proposed project Priest Rapids. [4]

Contractors were ready to accept Priest Rapids ighlands Irrigation District Gold Bonds for the onstruction of the proposed project.

XIV.

That the Dam Brothers undertook all of the work nd paid for all of the costs of the proposed delopment plans. They had the full confidence of the ndowners, the Federal, State and Civic authoriies, with their moral support and desire to see the am Brothers project constructed.

XV.

That it was just at this period, the spring o *1813,* that the above conditions and circumstance prompted the General Electric and Electric Bond & Share interests, the world's largest electrical group to make overtures to Dam Brothers which resulte in the formation of a joint adventure, April, 191 at the offices of the president of the Electric Bon & Share Company, 71 Broadway, New York, N. Y

XVI.

That the General Electric Company organized th Electric Bond & Share Company in 1905 for th following purposes: (1) To realize on various se curities acquired in selling its equipment. (2) Ob tain proprietary stake in promising young industry (3) To advance sales of its equipment. That th General Electric Company increased its capital an broadened its field of operations until it had grow to be the world's largest manufacturer of electrica equipment, under leadership of the founder, Mr Charles A. Coffin.

XVII.

Electric Bond and Share

That the Defendant, Electric Bond and Shar Company, was 100% wholly owned by General Elec tric Company from inception in 1905 to 1925. Soo after 1925 the General Electric Company distribute the Electric Bond and Share common stock amon the stockholders of the General Electric [5] Com pany.

XVIII.

American Power & Light Company

That the Defendant, American Power & Light Company, was organized by Electric Bond and Share Company for purpose of acquiring securities of companies operating or controlling electric power and light, gas, railways, water works, and other public utility properties, which became the largest subholding company in the Electric Bond & Share system, with assets of approximately 500 millions of Dollars by the year 1929. That from May, 1917, until November, 1935, American Power & Light Company did not have a single employee of its own and was wholly under Electric Bond's domination.

XIX.

Washington Irrigation & Development Company

That the Washington Irrigation & Development Company was organized in 1910 for the Electric Bond and Share Company to acquire water power-site lands and rights at Priest Rapids on the Columbia River, State of Washington. The entire common stock of the Washington Irrigation & Development Company has been owned, since organization, by American Power & Light Company. The president of American is also president of Washington Irrigation & Development, and the assistant secretary holds that office for both corporations.

XX.

General Electric at Priest Rapids

That about 1910 the General Electric Company's subholding and subsidiaries made their first investments in the Priest Rapids Colmbia River power site for the purpose of developing a hydroelectric power project. This power site investment of the General Electric-Electric Bond interests consisted of a narrow strip of shore land comprising a small acreage on the west bank of the Columbia River, upstream from the foot of the Rapids, held and owned under a dummy subsidiary holding company, the Washington Irrigation & Development [6] Company.

XXI.

That during this period and following the first power site investment at Priest Rapids, the Defendants also acquired the power site lands and rights located on the opposite side of the river, the east bank of the Columbia River, extending from the foot of the rapids, upstream to the head of Priest Rapids, a long narrow tract of land, from the Robert E. Strahorn interests, which land and rights Strahorn had held under the name of Columbia Valley Reclamation Company, of Spokane, Washington, a Washington State corporation.

XXII.

Restrictive Water Power Laws

That during this time, 1910, the United States Congress passed Water Power legislation under the

restrictive terms and conditions of which said electrical interests considered it impossible for them to finance and construct hydroelectric dams on navigable streams.

XXIII.

Power Trust Era

That the electrical power interests of the country were facing an adverse attitude on the part of the general public and the press and were termed "The Water Power Trust"—which adverse feeling throughout the nation was reflected in the minds of and the attitude of the members of the United States Congress. That this attitude and condition continued and with the restrictive water power laws stagnation of hydroelectric development became so serious by 1913 to the General Electric-Electric Bond & Share electrical interests they became alarmed. Realized that they must formulate some drastic plan to educate the public and the members of the United States Congress to secure a favorable change in the Federal Water Power Laws. [7]

XXIV.

That the said Defendants were unable to proceed with their development at Priest Rapids for a dam across the Columbia River at the foot of the rapids, because of the restrictive water power laws, which power site then constituted the largest possible hydroelectric development in the United States west of Niagara Falls, with the proposed development of

approximately 400,000 primary h.p. and 300,000 secondary h.p.

XXV.

Electric Bond & Share Concerned

That during this period, Sidney Z. Mitchell, president of the Electric Bond & Share Company, 100% owned by the Gneral Electric Company, became aware of and greatly concerned regarding the Dam Brothers and their Priest Rapids interests and plans for the development of power, irrigation and land on the east bank of the Columbia River at Priest Rapids. That Mr. Mitchell became much concerned for the following reasons:

A. That Dam Brothers plans would interfere with the large plans of General Electric-Electric Bond & Share to develop a single high dam at the foot of Priest Rapids.

B. That said plans of Dam Brothers for power and irrigation did not require Federal approval.

C. That the combination interests of Dam Brothers could claim full power development rights at Priest Rapids under the law.

D. That General Electric-Electric Bond & Share had only partial power site lands and rights at Priest Rapids and they anticipated difficulty in acquiring the full rights and lands there, needed to complete their plans for the proposed dam.

E. That Mr. Mitchell and Mr. Coffin felt that "power people" could not obtain a change in the ob-

ectionable water power laws, but that Dam Brothrs with their plans and interests could accomplish t. [8]

XXVI.

Dam Brothers Invited to New York

That Mr. Mitchell made overtures to Dam Brothrs which continued to April, 1913, and resulted in heir accepting Mr. Mitchell's invitation to go to Jew York for consultation. During conferences in is private office a complete study was made of the ntire power, irrigation and land situation at Priest Rapids, the Federal Water Power Laws, and the eed for large hydroelectric development, and with rge power users waiting, emphasizing the enorious business it would bring to the General Electric Company.

XXVII.

General Electric-Electric Bond-Dam Brothers Form Joint Adventure

That continually during the progress of these onferences Mr. Mitchell explained and extended ommitments to Dam Brothers to accept from the eneral Electric-Electric Bond & Share interests, hich later did cause Dam Brothers to believe and ccept these many and various attractive commitents, hereinafter set forth, and a joint adventure as formed with Electric Bond & Share Company t their offices, 71 Broadway, New York, N.Y., for e development of a greater Priest Rapids project.

XXVIII.

Plans, Purposes and Commitments of Joint Adventure

That it was at this time, April, 1913, agreed
Dam Brothers that their plans be abandoned
the development at Priest Rapids and they join
General Electric-Electric Bond substitute plans
a single and full development of the rapids at Pri
Rapids, creating a greater development there.

XXIX.

That Dam Brothers were to help obtain outsi
additional power site and industrial lands needed
complete the power site holdings at Priest Rapi
and which added lands would be turned over to
Electric Bond & Share Company, which would bu
the dam. With a Priest Rapids Power Compa
organized and incorporated by them when the fe
eral legislation for a power bill was passed. [9]

XXX.

That Dam Brothers were to make available
records, investigations, field work and knowled
and know how, which would aid the developme
including natural resources, minerals and operati
materials to be used by the prospective power use
to be located at Priest Rapids. To be an all elect
fied city, with no smokestacks.

XXXI.

That the Dam Brothers and Electric Bond a
Share Company would jointly acquire the lar

body of land, about 55,000 acres which was a part of the Dam Brothers original Priest Rapids project plans so that this new land ownership could be used as a basis and in helping to secure the proposed Federal Water Power Legislation, to permit the building of the dam at Priest Rapids. Help Dam Brothers continue control the private landowners during the legislative period, and to protect said Dam Brothers' plans for irrigation as irrigation was the first lawful use of the power to be developed.

XXXII.

That Dam Brothers, with their power and irrigation plans and extensive knowledge of irrigation farming, with their foremost standing in the west with prominent people, and the Priest Rapids Landowners Association, organized by Dam Brothers in 1911, could help obtain passage of a Federal Water Power Bill in Congress to permit Electric Bond & Share to build a dam at Priest Rapids, and it was agreed and expected that this could be accomplished within the next two sessions of the United States Congress.

XXXIII.

That Dam Brothers were to help educate and seek support of their Federal, State, County and Civic official friends, to insure support of the proposed and long-needed Federal water power legislation for the Priest Rapids dam. That the new greater Priest Rapids Power, Irrigation and Land Development Plans justified the federal legislation, emphasizing the irrigation project and the manufacture of agri-

cultural fertilizer as then being produced in [1
Europe.

XXXIV.

General Electric Anxious for Priest Rapids

That with a favorable change of the water pow
laws the Defendants would start at once to build t
dam at Priest Rapids. That the General Electri
Electric Bond & Share interests were then anxio
and ready to build the dam. That the financing a
the sale of the power were no problems to them. M
Mitchell represented that the great General Electr
Company was the largest electrical equipment ma
ufacturing concern in the world; that they own
Electric Bond & Share Company, and were behi
its development plans. That Mr. Charles A. Coff
then chairman of the Board of Directors of Gene
Electric, was anxious to see Priest Rapids d
veloped, which was later confirmed by the th
president of said corporation.

XXXV.

Commitments by Defendants

That the commitments of the General Electri
Electric Bond & Share interests at said time i
cluded the following:

A. That Dam Brothers would receive Five Hu
dred Thousand ($500,000.00) Dollars of the commo
stock of the Priest Rapids Power Company whi
would be incorporated for about $40,000,000.00 wh
the water power bill passed Congress.

B. That Dam Brothers were to own a large percentage of the land holding syndicate to be formed at once and purchase the approximately 55,000 acres of railroad-owned sagebrush lands, with the syndicate to be limited to and comprise the Dam Brothers, the Electric Bond & Share Company, with a few of their officials who would help in the Priest Rapids work.

C. That Dam Brothers were to have ten per cent (10%) interest in the Townsite-Terminal Company, to include industrial, business, residential and terminal property company operations. The operating companies to be incorporated when the power company was formed. [11]

D. That Dam Brothers were to receive the same division of ten (10%) per cent interest in various other syndicates and companies to be organized and acquire natural resources and minerals, etc. in connection with the Priest Rapids development. That there was need for construction materials as well as raw operating materials and minerals for power users which must be available to use with the power contracts.

E. That thereafter Defendants would furnish the funds for the various activities and expenses during the preconstruction period and the legislative work at Washington. That with the passage by the United States Congress of the Water Power Bill, the Electric Bond & Share Company would at once start all the activities at Priest Rapids and the commitments would all then be taken care of together with any

other unsettled or matters to be adjusted by them with Plaintiffs.

XXXVI.

Land Purchase Feature of Joint Adventure Agreement

That during the conferences in New York in April, 1913, it was agreed that Electric Bond & Share-Dam Brothers would purchase from the single ownership some 55,000 acres of sagebrush land-grant raliroad lands under and part of the original plans of Dam Brothers for irrigation adjacent to the Priest Rapids power site, on the east bank of the Columbia River. Extending back about thirty miles eastward and situated betwen the Columbia River on the west and south, and the Saddle Mountains on the north and east. Constituting a large, level, table-like plateau thirty miles long by four to twelve miles wide, comprising about 135,000 acres of the highest quality, volcanic ash sagebrush land—needing only irrigation water to produce every crop of the temperate zone, and equal to the best irrigated lands of the State of Washington. [12]

XXXVII.

That it was further agreed by Electric Bond & Share that the Dam Brothers would undertake, carry on and control the land development, and the irrigation project, sale and disposition of the said 55,000 acres of land to be purchased by the syndicate. Which purchase of land ownership with the irrigation plans were necessary as the basis for securing favorable water power legislation for a dam

to be built at Priest Rapids by the General Electric-Electric Bond & Share interests.

XXXVIII.

Land Syndicate Formed

That a land syndicate was formed during the said New York conferences and was part of the commitments and agreement of Electric Bond & Share and Dam Brothers with the division of undivided ownership, 30 per cent ownership for Dam Brothers, and 70 per cent ownership for Electric Bond & Share. Which 70 per cent undivided portion was divided by Mr. Mitchell, 25 per cent for Electric Bond & Share Company, and the balance of 45 per cent undivided ownership portion for some of the head officials of Electric Bond & Share-General Electric who would be close to the work for development of Priest Rapids projects.

XXXIX.

That Mr. Mitchell agreed upon his own voluntary commitments for Electric Bond & Share-General Electric interests that at all times the 30 per cent interest of Dam Brothers and the 25 per cent owned by Electric Bond & Share would be voted as one unit, controlling, so that no acts or policies would be made by the syndicate unless the one unit ownership (55%) agreed on the proposed action or policy, so that Dam Brothers' minority interest of 30 per cent would actually constitute a one-half voting unit position.

XL.

That when said ownership of the land had served its purpose during the Federal water power legislation, that upon passage of the [13] bill, it was agreed by Mr. Mitchell that Electric Bond & Share interests would release their unit control position of the land syndicate, and that Dam Brothers would take over the full management of the lands in regard to its disposition and policy. That the securing of a water power bill for Priest Rapids dam would compensate them fully and that Dam Brothers should receive the major financial benefit from the sale of the syndicate lands as part of the General Electric-Electric Bond & Share fulfillment of their joint adventure commitments to Dam Brothers.

XLI.

That another purpose for the purchase by the partnership of the 55,000 acres of land was to prevent some outside interests from acquiring title to this large body of land adjacent to Priest Rapids and interfering with the General Electric-Electric Bond & Share-Dam Brothers new joint plans for a one-power development with a dam at the foot of Priest Rapids, and the irrigation project.

XLII.

55,000 Acre Land Purchase

That the actual purchase of the 55,000 acres of land was carried out by Mr. Mitchell for the syndicate, immediately following the conclusion of the April, 1913, conference and formation of the joint

adventure agreement between Electric Bond & Share and Dam Brothers at their head office in New York City at 71 Broadway.

XLIII.

Large Acreage Added to Townsite

That when the decision was made at the conference to acquire the 55,000 acres of railroad grant lands, and form a syndicate of the Electric Bond & Share-Dam Brothers, it was called to Mr. Mitchell's attention by Dam Brothers that the approximate 55,000 acres of land to be acquired included considerable acreage adjoining the power site and flood lands held by the power rights holding company, the Washington Irrigation & Devlopment Company. That this land [14] bordering the power site and flood land should be transferred from the Land Holding Syndicate to the said company for the proposed power development and townsite, to be held until the water power bill passed in the United States Congress.

XLIV.

That it was also pointed out to Mr. Mitchell by Dam Brothers that the suggested transfer of these border lands to the power site holding company would add to the showing when filing for the permit for the Priest Rapids dam, with the government. Said lands were transferred from the land holding syndicate to the Washington Irrigation & Development Company, at a later date following the said purchase of the railroad lands. The lands have since then been held and are still a part of the assets of the

said power site holding company for the Pries Rapids development. And constitute one of th claims by the partners, Dam Brothers, against th said defendants as part of the April, 1913, partne ship agreement.

XLV.

Tufa Deposit Asset

That Dam Brothers also invited attention to Ele tric Bond & Share when suggesting transfer of th townsite border lands to the power site holding com pany, the existence of a mineral "Tufa," a form c natural cement, on Section 23, Township 15 Nortl Range 23, EWM., about 640 acres of land. Locate near the head of Priest Rapids, Grant County, avai able for construction without transportation cost.

XLVI.

That this Tufa material was valuable for the irr gation works, for building material and concret construction where limited pressures existed. Tha the section of Tufa land should also be held by th power-townsite land holding company, to be trans ferred to a "Tufa" Natural Cement Company de velopment organization, when the water power bi was passed and the power company formed to buil the dam at Priest Rapids. To supply the differen projects there. [15]

XLVII.

Tufa Deposit Interests General Electric

That during New York visits by plaintiffs, Fred erick G. Sykes, president of American Power

Light Company, and Mr. Edwin W. Rice, Jr., president of General Electric Company, both expressed interest in such a natural mineral deposit located right at Priest Rapids. Stating that because of the fact that the Tufa material was so important to the irrigation and land development, and that Dam Brothers had expected to use the Tufa in their Priest Rapids development plans, that Dam Brothers should have the management of the Tufa development as well as a major interest in the syndicate ownership and profits to be derived therefrom. Which joint suggestion by General Electric and American Power & Light officials was later agreed to by Mr. Mitchell, president of Electric Bond.

XLVIII.

Water Power Legislation December, 1913

That immediately after the date of the said agreement partnership, April, 1913, the Dam Brothers started on the agreed work that they would undertake to help secure the federal legislation for a dam at Priest Rapids. With the result that the water power legislation was introduced in the United States Congress during the 2nd Session of the 63rd Congress, December, 1913.

XLIX.

Water Power Bill Fight

That it was expected by all concerned that a water power bill for the Priest Rapids dam could be obtained during the coming two sessions of Congress,

within 18 months from that time. But the Genera Electric-Electric Bond & Share made unauthorized radical and controversial changes in the wate power legislative plans, without the knowledge o consent of plaintiffs, which changes resulted in th water power bill not being passed by Congress unti March, 1920—seven costly years after the legislatio was introduced in Congress. [16]

L.

Seven-Year Delay in Passage of Water Power Bil

That the delay of seven years in securing sai federal water power legislation was caused by Ger eral Electric-Electric Bond & Share changing th agreed plans for a water power bill which could hav been passed in Congress within two sessions, withou the knowledge or consent of Dam Brothers and con stituted a breach of their agreement with plaintiffs namely:

1. That the Electric Bond & Share substitute the plan to have a bill introduced and passed by Con gress for a dam at Priest Rapids only, with a sub stitute plan of Electric Bond & Share for two wate power bills, covering all of the United States, on bill for nonnavigable and one for navigable streams

2. Further, by adhering stubbornly and contin ually for impractical, impossible and illogical term for the water power bill, including the demand fo 99-year tenure instead of 50 years which was finall accepted, and which tenure has proven satisfactor for financing and building of hydroelectric dam

under Federal Water Power control, now for the past thirty years, following the passage of the Bill in March, 1920.

LI.

That the resultant delay of seven years in getting the Electric Bond & Share substitute water power legislation passed by the United States Congress caused added and heavy burdens to Dam Brothers.

LII.

That the land owned by the General Electric-Electric Bond & Share and Dam Brothers land holding syndicate-company was used continually in the arguments presented to Congress for securing the water power legislation, during the entire period from the first introduction in the 2nd session of the 63rd Congress, December, 1913, until and including the last arguments before the 2nd session of the 66th Congress when the Water Power Bill passed, March, 1920. The Act was signed by the President in June and became law. [17]

LIII.

That the said Land holdings of the partnership, the ownership, and the necessary power for the pumping plant of the Priest Rapids Highlands Project Irrigation system, were all used before Congress year after year to obtain the enactment of favorable water power laws. Always presenting the same arguments, both on the floor and in the hearings of the different committees of the United States Senate and House.

LIV.

That with the passage of a workable and favorable water power bill enacted into law, the General-Electric Bond & Share interests were highly elated and satisfied although the legislation had taken seven long years to accomplish. That the land and the irrigation project at Priest Rapids had served its purpose for them, in helping to obtain passage of this water power bill.

LV.

General Electric Subsidiary Files for Priest Rapids Dam Permit

That the newly created Federal Power Commission was formed and the application for the permit for the dam at Priest Rapids was filed by the General Electric-Electric Bond & Share interests in the name of the said Washington Irrigation & Development Company, the power rights and townsite land holding company for the Priest Rapids dam site, which holding company was 100% owned by the American Power & Light Company, which in turn was then controlled by the Electric Bond & Share Company, which was then owned 100% by the General Electric Company.

LVI.

Conspiracy and Breach of Contract

That certain events which took place during 1920 and 1921 indicated that there had existed a conspiracy on the part of the power holding company,

the Washington Irrigation and Development Company and the Electric Bond & Share and their head officials as representative agents to deprive, damage and harm the Dam Brothers in regard [18] to the Land Holding Syndicate-Company, Dam Brothers interests and assets at Priest Rapids. By the acts of the said electric interests-partners and associates, in that these partners of Dam Brothers, committed acts of conspiracy, conniving and misrepresentation, by undertaking secretly to dispose of the entire land holdings of approximately 50,000 Acres owned by the General Electric-Electric Bond Share interests-Dam Brothers land holding synicate-company, without the knowledge, counsel or consideration of their partner-associates Dam Brothers. In complete violation of the 1913 Joint Adventure Agreement, thus constituting a major breach of contract. This act of conspiracy by the Defendants through their officers immediately followed the passage of the Water Power Bill March, 1920, and would have deprived Dam Brothers of benefits to be derived by said Dam Brothers as a part of the said 1913 Agreement. The secret land sale was blocked by Dam Brothers and the said transaction was then dropped by the Defendants.

LVII.

Lands Become Valuable Syndicate Incorporated

That the General Electric-Electric Bond & Share interests had so bungled and mismanaged the legislative work for the water power bill that it was by

1916 involved in serious controversial debate in Congress, and the land holdings of the said syndicate had become so important in consideration of the legislation and its prospective agricultural value that Mr. Mitchell thought it best to incorporate the land holding syndicate. The Columbia Highlands Company was therefore incorporated in 1916 and the syndicate transferred title of the entire land holdings to the new land holding corporation-syndicate.

LVIII.

That the capital stock of the Columbia Highlands Company was distributed to the representative undivided ownership interests with the same percentage of ownership as was owned and held by them in the [19] land holding syndicate of April 1913. With the assurances of Mr. Mitchell to Dam Brothers for the General Electric-Electric Bond & Share insuring Dam Brothers the same commitments, provisions, and conditions as agreed by Mr. Mitchell in 1913, pertaining to the Dam Brothers control and other features in connection with the land, its sale, disposition, and policies when the Water Power bill was passed and became a law.

LIX.

Electric Bond & Share Use Dam Brothers for New and Added Requirements

That the General Electric-Electric Bond & Share interests, with the water power bill a law, which would permit the development of the Priest Rapids

project, outlined and called upon Dam Brothers to further help and assist them on a program which included the obtaining of the water power permit, and the issuance of the license for the dam at Priest Rapids, investigations and locating additional raw operating materials and minerals which would be required by the prospective power users to be located at Priest Rapids.

LX.

Permit Issued for Dam

That on March 3, 1921, the Permit was issued for the dam at Priest Rapids by the Federal Power Commission, as power project No. 3, and the power holding company undertook the diamond drilling of Priest Rapids dam foundations, and Electric Bond & Share Company proceeded to complete the engineering work and plans in its own engineering offices at 71 Broadway, New York City, so that a contract could be awarded for the construction of the said dam.

LXI.

That June, 1922, saw the foundations determined and the field work at Priest Rapids and the engineering plans completed for the dam. Whereupon, Mr. Mitchell desired and strongly emphasized the importance then of Dam Brothers undertaking and completing the irrigation [20] engineering for the Priest Rapids Highlands project to irrigate the approximately 135,000 acres, including the General Electric-Electric Bond and Share-Dam Brothers and holding-syndicate-company, about 50,000 Acres,

while Electric Bond prepared to let the contract fo the building of the dam at Priest Rapids.

LXII.

Dam Brothers Buy Highlands Lands

That the Dam Brothers in view of the definitel assured early starting of the dam construction a Priest Rapids and the recent land sale conspirac by Defendants in their attempt to deprive the Dar Brothers of their rights, it was believed by Dar Brothers that they should acquire the syndicate lan holdings in order to protect the irrigation project a well as their interests at Priest Rapids. That as th result of conferences during June, 1922, in Ne York, reviewing the entire Priest Rapids projec and allied features, Mr. Mitchell recommitted th General Electric-Electric Bond and Share commi ments, and others added due to Defendants' desi for new and added help from Dam Brothers, a lan purchase agreement was made between Mr. Mitche and Dam Brothers, just 9 years after the Joint Ad venture agreement of 1913, in the same private of fice of Mr. Sidney Z. Mitchell, president of Elec tric Bond, 71 Broadway, New York.

LXIII.

That a cash down payment of a considerable sur was made to Mr. Mitchell personally by Dar Brothers, on the Land Purchase Agreement. Tha this payment was made after the positive assuranc of Mr. Mitchell that General Electric-Electric Bon

ere ready to get started right away for letting the onstruction contract for the dam at Priest Rapids. hat Mr. Mitchell was so confident of starting the onstruction of the dam right away that he was ffered to accept one half of the substantial cash-own payment by Dam Brothers on the land pur-hase comprising the entire land holdings of the yndicate-company, with the second half or balance f the cash-down [21] payment to be paid in Sep-mber by which time he stated evidence would be n hand for Dam Brothers of the starting of the ng awaited dam construction at Priest Rapids.

LXIV.

Dam Brothers Complete Engineering

That Plaintiffs on return West from the June, 922, New York conferences with Electric Bond & hare, took immediate steps and followed out Mr. litchell's desires and expended large sums of oney for engineering work to complete the ir-gation system plans ready for turning over to the ntractor for construction. That the month of Sep-mber came and passed with Dam Brothers busy ith the Priest Rapids work of carrying out the gineering and other general matters resulting om the June meeting in New York. Still there was o sign of evidence in hand of the General Electric-lectric Bond & Share interests starting actual con-ruction work on the dam as assured and commited y Defendants in June.

LXV.

Electric Bond Fails to Start on Dam

That when Dam Brothers delayed to make the second half of the cash-down payment during september because Defendants failed to start the construction on the Priest Rapids dam, an official of the General Electric-Electric Bond & Share Western operating subsidiary utilities requested a meeting with Dam Brothers in their Seattle offices; at an appointed time arrived accompanied by his General Counsel, who was also a director of the Priest Rapids holding companies and the Western subsidiaries of General Electric-Electric Bond & Share interests.

LXVI.

General Electric Representatives Call

That these two high officials as agents of General Electric-Electric Bond & Share interests, used their time at this meeting with both Dam Brothers present in their private offices, to promise, urge [22] and argue that Mr. Mitchell was getting ready at last to start the Priest Rapids dam, that Dam Brothers release said second half of the cash-down payment so that the land holding syndicate-company could pay off the mortgage soon due, one official had just returned from New York and therefore he knew that Mr. Mitchell would soon start on the dam. That they would not make the trip to Dam Brothers' Seattle offices and make such claim if they did not know and believe Mr. Mitchell would

atcually start construction this time sure. That to show evidence of good faith they were authorized from New York offices to grant an extension for one year to Dam Brothers in which to start the annual cash installment payments on the purchase agreement, (1922-June). The payment was later released.

LXVII.

Payment Release Disastrous

That these official statements and commitments made by these two high officers of General Electric-Electric Bond & Share's subsidiaries, to Dam Brothers, later proved to be false and misleading, thereby resulting in disastrous repercussions subsequently for the Dam Brothers and from which they never financially recovered. That this was entirely the fault and brought on by General Electric-Electric Bond & Share interests.

LXVIII.

That with the payment by Dam Brothers of the second half of the substantial down payment for the March, 1923, Directors Meeting (Columbia Highlands Company), obtained from Dam Brothers, it was evidently easy thereafter for the Defendants to obtain annually smaller and nominal amounts from plaintiffs, compared to the first two large cash payments, with offers of annual extensions to Dam Brothers for starting the annual cash installment payments which were to have been made from the actual starting of the dam construction at Priest

Rapids. That these nominal and smaller annual land purchase extensions payments were made by Dam Brothers to Defendants to cover County Taxes, corporate expenses of the syndicate-company [23] land holding company, the Columbia Highlands Company, between 1923 and 1926, and to eliminate stock assessments by the Company.

LXIX.

Post License Period 1925-1929

That on March 25, 1925, the Federal Power Commission issued the License for the dam on the Columbia River at Priest Rapids to be constructed by the Electric Bond & Share Company, five years to the month after the passage of the Water Power Bill. That because of mis-management and poor judgment by Defendants several years of valuable time was lost before obtaining the said License.

LXX.

That the country was in the middle of a ten year electrical boom and industrial prosperity, with the demand for large blocks of hydro-electric power resulting in new power construction and installation all over the United States.

LXXI.

That everything envisioned by Mr. Charles A. Coffin, head of the great General Electric Company, as pictured to Dam Brothers during the April, 1913, New York conferences, about hydro-electric devel-

opment, new and wonderful uses for electricity, the enormous prospective demand for electrical equipment and products manufactured by General Electric Company, if favorable water power legislation could be secured, all came to pass. And more too, in the way of electro-metallurgical and electro-chemical demands for hydro-electric power and anxious to go to Priest Rapids. Yet, the world's leading electrical interests failed to start construction of the dam at Priest Rapids upon receiving the License from the Government.

LXXII.

That defendants could have easily financed and constructed said dam, as there were large power users and customers anxious for large blocks of industrial power far exceeding the full possible capacity of the Priest Rapids dam. The worth of the Electric Bond & Share [24] Company, wholly owned by the General Electric Company, increased and mounted from the passage of the Water Power Bill, March, 1920, with the forming and buying of utility companies, domestic and foreign, investments by the Hundreds of Millions of Dollars, as a direct result of the improved water power laws. The origin, the starting in 1913, and need for same based almost entirely upon the plans and work of Dam Brothers; the main purpose of the Joint Adventure formed by them and General Electric-Electric Bond, the successful enactment of the bill which received the valuable and loyal contributions of the Plaintiffs.

LXXIII.

That the last five years of this most prosperous period in the history of the United States, for privately owned utilities, termed the "Electrical Era," was permitted to pass by the Electric Bond and Share Company by bungling and mismanaged what limited attention they gave the Priest Rapids plans, wasted and dissipated this wonderful opportunity to develop this most favorable water power site, in which the General Electric-Electric Bond had then upwards of $10,000,000.00 invested.

LXXIV.

That the General Electric Company had become the world's largest electrical equipment manufacturing concern, having enjoyed enormous business companies, the largest Private Utility Holding Company in the United States according to Government investigations.

LXXV.

That because of the depression following the 10 year Electrical Boom and prosperity, the government policy of building large hydroelectric dams, and the World War II years with restriction in the use of Capital, Materials and Labor, development by private utilities was not considered favorable. There was continued hopefulness for the conditions to change and construction of dams by the private power companies throughout the United States. [25]

LXXVI.

A Major Priest Rapids Asset Ruined

That following cessation of hostilities of World War II the Defendants entered into negotiations in fraud of the rights of Dam Brothers therein by selling the total land holdings of the Syndicate-Company on the Priest Rapids Highlands for a nominal sum, and Forever placed said partnership syndicate lands out of the power of the Defendants and Dam Brothers for development and sale. That at all times Dam Brothers served written and verbal notice of their objections to any disposition of the said Syndicate lands, either in whole or in part.

LXXVII.

That in protesting the said proposed sale of the lands, Dam Brothers sent registered mail notices to the defendant companies, General Electric-Electric Bond and Share, and the Columbia Highlands Company, to serve warning of the Defendants' responsibility and their obligations to Dam Brothers for their vast and substantial various investments and interests at Priest Rapids, holding defendants accountable for full losses, damages, and claims, resulting from the sale of said Syndicate lands, or for any other acts committed by them effecting the Priest Rapids assets without full consideration of Dam Brothers interests.

LXXVIII.

Tufa Deposit Sold for Paltry Sum

That said deposit of Tufa was held by the Priest Rapids power site-industrial land holding company,

the Washington Irrigation and Development Com pany, continually up to about the year 1949, whe the Plaintiff learned in the private office of th Western General Counsel for the General Electri Electric Bond & Share's Pacific Northwest interest who also was president of the said land holdin company, that he had just the week before sold th said Tufa deposit land, for thirty-five hundred do lars. The said sale was made by Defendants withou consent or knowledge of Dam Brothers. That plain tiff made vigorous oral objections and complaint t said official, for making the said sale and for no consulting Dam Brothers before even negotiatin the sale of the Tufa deposit section of land.

LXXIX.

That the plaintiff was responsible for the Tuf Section of land of about 640 Acres, being originall called to Defendants attention during the first pe riod of the General Electric-Electric Bond & Share Dam Brothers partnership and its transfer to th power site-industrial land holding company, whic had since held title to the said Tufa deposit. Tha this deposit of natural cement formation had alway been considered by the partnership formed in 191 as being an asset that could be used and develope independent of the other Priest Rapids assets, an would have a ready demand upon the open [27 market.

LXXX.

Allegation of Performance

That at all times, herein mentioned, without exception, the Dam Brothers fulfilled every pledge, duty and obligation that they were committed to by the Joint Venture agreement with General Electric-Electric Bond and Share. In addition Dam Brothers fulfilled every request by Defendants for discovery, location and investigation, research, laboratory work, and prepared reports therefrom and furnished Defendants, covering numerous raw materials and minerals required by large industrial concerns proposing to locate at Priest Rapids and contract with Defendants for large blocks of electrical power to be produced at Priest Rapids dam.

LXXXI.

That the General Electric-Electric Bond and Share failed to fulfil any of their commitments to Dam Brothers during the periods mentioned in the complaint, covered by the Joint Adventure agreement made April, 1913, and additional commitments made by the Defendants following the first agreement with Plaintiffs.

LXXXII.

That the great wealthy General Electric-Electric Bond and Share interests swamped in enormous successful growth, development and profits following the passage of the Water Power Bill in the United States Congress, although neglecting and failing to

build the dam at Priest Rapids after receiving the Government permit, diverted accomplishments of the Joint-Adventure for Defendants sole and separate independent use, benefit and advantage. Which benefit and advantage ran into hundreds of millions of dollars of profit and value, and contributed greatly to Defendants increased worth to over $2,000,000,000.00 according to Government and private Financial Reports. [28]

LXXXIII.

That in view of the fact that Defendants recently started to liquidate their utility interests located in the State of Washington, it became evident to plaintiffs that defendants did not intend to develop the Priest Rapids project and therefore a written demand was made on June 14, 1951, for a full settlement in connection with the Priest Rapids project, in response to which defendants have made no reply.

LXXXIV.

That it was just learned by the plaintiffs that the defendants are giving away the entire Priest Rapid power site holdings, the main part of which property holdings have been held in trust by defendant dummy holding company, the Washington Irrigation & Development Company, since its organization in 1910, of which all its common stock has been held by the American Power & Light Company.

LXXXV.

That the Defendants have therefore by their own recent actions made the purpose of the join

adventure agreement incapable of [29] performance.

LXXXVI.

(1) That as a direct and proximate result of defendants breach of the joint-adventure agreement the plaintiffs have suffered loss and damages as follows:

1.	Priest Rapids Power Company common stock	$ 500,000.00
2.	10% Interest Townsite—Terminal Company common stock	250,000.00
3.	10% Interest Limestone Company construction supply—chemical works user	100,000.00
4.	30% Interest Tufa Natural Cement Company common stock	50,000.00
5.	Hydro-Chemical Operations-Niagara Falls Plant successful Operation (interest holding company)..	90,000.00
6.	Strategical Minerals—Raw Materials—Basic items for Major power users—Electro-metallurgical Electro-chemical Industries, including Aluminum Clay-Alunite-Bauxite Deposits (Metals) Iron Ore, Magnesium, alloys (Electric Furnace) Phosphate Rock, Sulphur, etc. (Chemicals), Coal and Coke (Industries) Timber, Sodium Sulphate (Pulp-Paper-Rayon)	300,000.00

7.	Land—Syndicate 50,000 Acres (3 rural townsites, completely engineered project), 30% of total profit	900,000.00
8.	Engineering—135,000 acre project—Irrigation, power, etc.....	250,000.00
9.	Private owned lands—Highlands.	750,000.00
10.	Offices, laboratory, ranches, equipment, livestock, homes, autos.....	160,000.00
11.	Mines, mineral lands, research engineering, professional records, maps and reports.....	200,000.00
	All to plaintiffs damage in the sum of	$3,550,000.00

LXXXVII.

(2) That as a further direct and proximate result of defendants breach of the joint adventure agreement the plaintiffs have suffered loss and damages as follows:

Said plaintiffs, Dam Brothers, in, and because of said breach of the joint adventure agreement, as alleged, suffered loss of finances and credit; loss of business activities; engineering opportunities and operations;

Loss of business standing and reputation; loss of friends and business association and connections; loss of relationship with prominent Federal, State and Civic Officials; railroad, irrigation, power and

professional men; social, club and community life and standing;

Great mental anguish, worry and suffering and humiliation; that plaintiffs have suffered the above losses and injury for a long period of time and will continue to suffer for the rest of their lives;

That defendants benefited by numerous official business trips and entertainment over a long period of years; use of plaintiffs finances, credit, offices, employees, properties and equipment; use of plaintiffs professional and business records, knowledge, knowhow and time; use of plaintiffs associates and friends, position and public relations;

All to plaintiffs damage in the sum of $5,000,000.00 [31]

That the failure of the Defendants during their relationship with the Plaintiffs from the formation of the joint adventure in April, 1913, and up to the present time, to carry out their agreements and commitments with plaintiffs, or at all, and their failure to fully compensate plaintiffs for reimbursements, adjustments, and for services rendered and materials furnished has caused the plaintiffs to suffer damages and losses in the aggregate sum of eight million five hundred fifty thousand ($8,550,000.00) dollars.

Wherefore plaintiffs pray that they may recover judgment herein against Defendants, and each of them for the total sum of $8,550,000.00 together with their costs and disbursements herein. For such

other and further relief as to the Court may seem just and proper.

/s/ HARVE H. PHIPPS,
Attorney for Plaintiffs.

Duly verified.

[Endorsed]: Filed July 16, 1952. [32]

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendant, General Electric Company, a foreign corporation:

You are hereby summoned and required to serve upon Harve H. Phipps, plaintiffs' attorney, whose address is 223 Rookery Building, Spokane 1, Washington, an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal] /s/ STANLEY D. TAYLOR,
Clerk of Court.

Date: July 16, 1952.

Return on service of writ attached.

[Endorsed]: Filed July 16, 1952. [33]

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendant, American Power & Light Company, moves the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action or, in lieu thereof, to quash the return of service of summons on the ground (a) that the defendant is a corporation organized under the laws of Maine and was not and is not subject to service of process within the Eastern District of Washington, nor in the State of Washington; and (b) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavit of Howard L. Aller hereto annexed as Exhibit "A."

3. To dismiss the action on the ground that it is in the wrong district because (a) the jurisdiction of this court is invoked solely on the ground of diversity of citizenship and neither all the plaintiffs nor all the defendants reside in the Eastern District of Washington and (b) all the defendants are indispensable parties, and defendants American Power & Light Co. and Electric Bond and Share Company are not subject to service of process in the Eastern District [34] of Washington, nor in the State of Washington, all of which more clearly appears in the affidavit of Howard L. Aller hereto

annexed as Exhibit "A" and the motion to dismiss of the defendant, Electric Bond and Share Company, filed herein, and to which reference is hereby made.

/s/ ALAN G. PAINE,

/s/ ALAN P. O'KELLY,

PAINE, LOWE & COFFIN,

Attorneys for Defendant American Power & Light Company. [35]

EXHIBIT "A"

[Title of District Court and Cause.]

AFFIDAVIT

State of New York,
County of New York—ss.

Howard L. Aller, being first duly sworn, deposes and says:

1. That he is now, and since November, 1935, has been, the President of American Power & Light Company, a defendant named herein.

2. That American Power & Light Company is a corporation organized and existing under the laws of the State of Maine, having been created under the laws of the said State of Maine on September 20, 1909.

3. That the principal corporate office of American Power & Light Company, is, and during its

entire corporate existence has been, in Augusta, Maine, American Power & Light Company, at all times during which affiant has been its President, has maintained said office in Augusta, Maine, and an office in [36] the City of New York, New York, and at no other place within any state of the United States or any foreign country and specifically has not maintained any place of business whatsoever in the State of Washington.

4. That American Power & Light Company is and always has been a holding company engaged in the business of acquiring by transactions within the State of New York or in interstate commerce, for the purposes of investment and realization upon, the securities of public utility companies operating in various states of the United States, including the State of Washington, and of converting by transactions in New York or in interstate commerce its investments in said securities into other forms of investment in securities and cash. It has never conducted any part of its ordinary and regular business within the State of Washington or been present in the state for the transaction of its regular business.

5. That American Power & Light Company is now, and ever since November 25, 1946, has been, in process of dissolution.

The Securities and Exchange Commission of the United States, acting pursuant to provisions of the Public Utility Holding Company Act of 1935, by

an order dated August 22, 1942, directed that th existence of American Power & Light Company b terminated and said company dissolved. The sai order of the Securities and Exchange Commissio was contested by it in the United States Circu Court of Appeals for the First Circuit and in th United States Supreme Court with the result tha the said order of dissolution of the Securities an Exchange Commission was upheld and held effectiv for all purposes. The opinions in the said litigation are set forth at 329 U. S. 90, and 141 F. (2d) [3 606.

6. That American Power & Light Compan owns no property within the State of Washingto but does own all of the outstanding Common Stoc of The Washington Water Power Company, Washington corporation.

That pursuant to an order of the Securities an Exchange Commission, dated June 6, 1952, and a order of the United States District Court for th District of Maine, Southern Division, dated Jul 17, 1952, American Power & Light Company wi dispose of all of its interests in The Washingto Water Power Company.

That American Power & Light Company own all of the outstanding capital stock and debt secur ties of Washington Irrigation & Development Com pany, a Washington corporation whose only asse in the State of Washington are some lands, largel uncultivated and idle, and certain securities of Th

Limestone Company, a Washington corporation which owns real estate in the State of Idaho.

That Washington Irrigation & Development Company transacts no business except the incidental leasing of minor portions of its real estate, and such business is entirely separate and different from that conducted by American Power & Light Company. Washington Irrigation & Development Company engages in no business whatsoever on behalf of American Power & Light Company and at no time has Washington Irrigation & Development Company transacted or engaged in business as agent or representative of American Power & Light Company.

That pursuant to an order of the Securities and Exchange Commission, dated June 6, 1952, and an order of the United States District Court for the District of Maine, Southern Division, dated July 17, 1952, American Power & Light Company will dispose of all of its interests in Washington Irrigation & Development Company. [38]

7. That American Power & Light Company has entered into no commercial transactions whatsoever in the State of Washington for the last several years.

8. That the books and records of American Power & Light Company and those of Washington Irrigation & Development Company are separate and distinct.

9. That American Power & Light Company has never qualified as a foreign corporation under the laws of the State of Washington.

That American Power & Light Company has never maintained, appointed or located any officer or managing or general agent in the State of Washington to conduct business for it or to receive service of process on it.

10. That neither a copy of the summons or a copy of the complaint was served upon American Power & Light Company or the affiant or any officer or agent of American Power & Light Company, by a United States Marshal, a United States Deputy Marshal or any person specifically appointed by the Court for that purpose.

/s/ HOWARD L. ALLER.

Subscribed and sworn to before me, a Notary Public in and for the County and State aforesaid, this 31st day of July, 1952.

[Seal] /s/ FLORENCE O. DEMO,
Notary Public, State of New York.

Term Expires March 30, 1954.

Receipt of copy acknowledged.

[Endorsed]: Filed August 5, 1952. [39]

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendant, Electric Bond and Share Company, moves the court as follows:

1. To dismiss the action or, in lieu thereof, to quash the return of service of summons on the ground (a) that the defendant is a corporation organized under the laws of New York and was not and is not subject to service of process within the Eastern District of Washington, nor in the State of Washington; and (b) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of George G. Walker and B. M. Betsch hereto annexed as Exhibits "A" and "B."

2. To dismiss the action on the ground that it is in the wrong district because (a) the jurisdiction of this court is invoked solely on the ground of diversity of citizenship and neither all the plaintiffs nor all the defendants reside in the Eastern District of Washington and (b) all the defendants are indispensable parties, and defendants, American Power & Light Company and Electric Bond and Share Company, are not subject to service of process in the Eastern District of Washington, nor in the State of Washington, all of which more clearly appears in the affidavits of George G. Walker and B. M. [40] Betsch hereto annexed as Exhibits "A" and "B" and the motion to dismiss of the defend-

ant, American Power & Light Company, filed herein and to which reference is hereby made.

/s/ ALAN G. PAINE,

/s/ ALAN P. O'KELLY,

PAINE, LOWE & COFFIN,

Attorneys for Defendant Electric Bond and Share Company. [41]

EXHIBIT "A"

[Title of District Court and Cause.]

AFFIDAVIT

State of New York,
County of New York—ss.

George G. Walker, being first duly sworn, deposes and says:

1. That he is now and since November 29, 1944, has been the President of Electric Bond and Share Company, a defendant named herein.

2. That Electric Bond and Share Company is a corporation organized and existing under the laws of the State of New York, having been created under the laws of said State in 1905. [42]

3. That the principal corporate office of Electric Bond and Share Company is, and during its entire corporate existence has been, in the City of New York, New York. Electric Bond and Share Company, at all times during which affiant has been

its President, has maintained said office in the City of New York, New York, and at no other place within any state of the United States or any foreign country, and specifically has never maintained any place of business whatsoever in the State of Washington.

4. That Electric Bond and Share Company is and always has been a holding company and, while affiant has been President of Electric Bond and Share Company, it has never conducted any part of its business within the State of Washington or been present in said State for the transaction of any part of its business.

5. That at all times during which affiant has been President of Electric Bond and Share Company it has owned no property within the State of Washington and owns no securities of any company which does business in the State of Washington.

6. That since February 15, 1950, Electric Bond and Share Company has owned common stock of American Power & Light Company constituting less than 8 per cent of the voting power of the common stock of American Power & Light Company.

7. That no officer or representative of Electric Bond and Share Company has been present within the State of Washington within the last several years and that it has entered into no commercial transactions whatsoever in the State of Washington while affiant has been President of Electric Bond and Share Company. [43]

8. That Electric Bond and Share Company has never qualified as a foreign corporation under the laws of the State of Washington, that while affiant has been President of Electric Bond and Share Company, it has never maintained any office or place of business in the State of Washington or maintained, appointed or located any officer or managing or general agent in the State of Washington to conduct business for it or to receive service of process on it.

9. That neither a copy of the summons nor a copy of the complaint in this case was served upon Electric Bond and Share Company or the affiant or any officer or agent of Electric Bond and Share Company by a United States Marshal, a United States Deputy Marshal, or any person specifically appointed by the court for that purpose, that the only notice of the institution of this suit received by Electric Bond and Share Company was a copy of a purported summons and a complaint which were delivered to it in New York by United States mail, in an envelope bearing the name and return address of the attorney for plaintiffs.

/s/ GEORGE G. WALKER.

Subscribed and sworn to before me, a Notary Public in and for the County and State aforesaid, this 29th day of July, 1952.

[Seal] /s/ DONALD T. HOWELL,
Notary Public for the State of New York.

Commission expires March 30, 1953. [44]

EXHIBIT "B"

[Title of District Court and Cause.]

AFFIDAVIT

State of New York,
County of New York—ss.

I, B. M. Betsch, being first duly sworn, depose and say:

1. That I am the Secretary and Treasurer of Electric Bond and Share Company, one of the defendants named herein, and in such capacity have custody of the corporate securities owned by Electric Bond and Share Company.

2. That Electric Bond and Share Company owns 183,050 shares of the capital stock of American Power & Light Company, a defendant named herein.

3. That I have from time to time read financial reports issued by American Power & Light Company and on the basis of such financial reports, American had at December 31, 1951, a total of [45] 2,342,411 shares of capital stock issued and issuable.

4. That the capital stock of American Power & Light Company owned by Electric Bond and Share Company constitutes approximately 7.81% of the voting power of all the capital stock of American Power & Light Company.

5. That the only notice of this suit which Electric Bond and Share Company has received was a purported summons, bearing no signature, to which was attached a copy of the complaint herein; that the said purported summons and copy of complaint were received in my office in an envelope which bore the legend

"From: Harve H. Phipps, Lawer, 223 Rookery Building, Spokane 1, Washington."

Addressed, "To: Electric Bond & Share Company, 2 Rector Street, New York City 6, New York."

that the said envelope and contents were delivered by United States mail.

/s/ B. M. BETSCH.

Subscribed and sworn to before me this 31st day of July, 1952.

[Seal] /s/ DONALD T. HOWELL,
Notary Public for the State of New York.

Commission expires March 30, 1953.

Receipt of copy acknowledged.

[Endorsed]: Filed August 5, 1952. [46]

[Title of District Court and Cause.]

AMENDED COMPLAINT

Come now the plaintiffs and for first cause of action against the above defendants, complain and allege as follows:

I.

That the Court has jurisdiction of the above-entitled action for the reason that there exists a diversity of citizenship of the parties litigant, the plaintiffs being residents of the State of Washington, and the defendants being foreign corporations, the defendant, General Electric Company, being incorporated under and by virtue of the laws of the State of New York; the defendant, American Power & Light Company, being a corporation incorporated under and by virtue of the laws of the State of Maine, and the defendant, Electric Bond & Share Company, being a corporation incorporated under and by virtue of the laws of the State of New York; that likewise the matter in controversy exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs; that defendant, General Electric Company, and the defendant, American Power & Light Company, are doing business in the State of Washington, and the defendant, Electric Bond & Share Company, was at all times herein mentioned the agent, servant and representative of the defendant, General Electric Company, and one of the chief instrumentalities and agents, [47] through which said General Elec-

tric Company did business, and said Electric Bond & Share performed for defendant principal, General Electric Company, the acts performed by it as alleged hereinafter.

II.

That the defendants, General Electric Company and American Power & Light Company, have wholly controlled at all times mentioned herein, the Washington Irrigation & Development Company, a Washington corporation, and said Washington Irrigation & Development Company has been and is, employed and used by said defendant corporations only as a dummy and instrumentality, so that the said defendant corporations could perform their respective businesses through and by it; that prior to, and at the time of the commencement of this action, the said Washington Irrigation & Development Company, was owned and was being used by the American Power & Light Company in the fashion and in accord with the allegations made in this paragraph.

III.

That plaintiffs had been and were active in the early irrigation and land development in the Columbia River Basin area and particularly in the undeveloped valley on the Columbia River at Priest Rapids prior to the year 1900, and the said brothers, plaintiffs, had in the year 1913 completed engineering surveys and investigation in the said Priest Rapids area which determined the feasibility of plans for the construction of irrigation and power development projects in and about said area; that

the area so described comprises about 135,000 acres of highly irrigable lands in the State of Washington; that plaintiffs had likewise organized the Priest Rapids Land Owners Association comprised of private owners of lands and over 1,000 in number, which ownership represented approximately 50% of the total acreage of the proposed and planned project, and said plaintiffs had also caused to be accomplished necessary and advantageous changes in the Washington State Irrigation [48] District Laws through their work in the Washington State Legislature in 1911 and 1913, and had directly helped to secure appropriations from the State of Washington and from the U. S. Government for geological surveys in the State of Washington, which included the first topographical maps covering the Priest Rapids area.

IV.

That plaintiffs had made or caused to be made engineering investigations of every phase of the proposed Priest Rapids project including power and irrigation development and scientific crop raising and production, and had organized plans and studies for the use of mechanized equipment in all phases of the project when necessary and applicable, and said plaintiffs had likewise acquired and secured control of a large acreage of undeveloped land known as the Priest Rapids Highlands and had worked out a transportation system, including the proposed and ultimate construction of the Chicago, Milwaukee, St. Paul & Pacific Railroad to

said valley, and the extension of telephone and telegraph facilities to said area; and said plaintiffs had financially interested various friends, and interests for the purpose of being able to colonize said land and property and develop said land and project, and pursuant thereto plaintiffs had undertaken said work and assumed and paid a great deal of the proposed costs of the development.

V.

That prior to the time of the formation of the joint venture hereinafter alleged, the General Electric Company had organized the Electric Bond & Share Company in 1905 for the following purposes:

(1) To realize on various securities acquired in the sale of its equipment.

(2) To obtain proprietory stakes in growing and promising young industry.

(3) To advance the sales of its equipment.

That the said General Electric had grown to be and was the world's [49] largest manufacturer of electrical equipment, and was represented by it in conversations with plaintiffs by one Charles A. Coffin, then chairman of the board, and by one Sidney Z. Mitchell, representative and agent of the General Electric Company, and likewise at the time of the organization of the joint venture, the President of the Electric Bond & Share Company, and likewise chairman of the board of the American Power & Light Company, which owned, controlled

and used the said Washington Irrigation & Development Company as a dummy agent and instrumentality of the defendant corporations named herein and particularly of the General Electric Company and American Power & Light Company; that all of the defendant corporations herein were organized and employed for the purpose of promotion of the interests of the defendant, General Electric Company and were directly under the control of the General Electric Company, and said corporations organized and controlled at all times herein the Washington Irrigation & Development Company as a dummy and instrumentality of said defendant corporations and particularly the defendant General Electric Company.

VI.

That prior to the entry of the parties, defendants and plaintiffs, into the joint venture, said defendant, General Electric, had made certain investments in the Priest Rapids power site for the purpose of developing a hydro-electric power project and had acquired certain acreage on the west bank of the Columbia River upstream from the foot of Priest Rapids, which said defendant, General Electric, held, owned and controlled through its dummy, Washington Irrigation & Development Company; that following said first investment other power site lands were acquired by defendant, General Electric, on the opposite side of the river or the east bank of the Columbia, and said land had been acquired from the Robert E. Strahorn in-

terests, which held said land under the name of Columbia River Reclamation Company of Spokane, Washington, [50] a Washington corporation.

VII.

That about the year 1910, the Congress of the United States had enacted certain water power legislation which was restrictive of defendant corporations' interests, which proposed to finance and construct hydro-electric dams on navigable streams, and there was a general adverse attitude of the public and Congress toward the defendant corporations' proposals and expansion and there was concerted and general opposition to the plans of said defendant corporations in hydro-electric development and otherwise, and such attitude made it impossible for said defendant corporations to proceed at said time with the proposed plans then had and held by said corporations to develop hydro-electric power by construction of a dam at Priest Rapids.

VIII.

That thereafter and shortly prior to the formation of the joint venture hereinafter alleged, the defendant corporations, General Electric Company and Electric Bond & Share, through their agents and representatives and through Mr. Sidney Z. Mitchell and Mr. Charles Coffin, entered into discussion with said plaintiffs, which discussions were held in Washington State and in New York by said defendants and their representatives and Messrs. Mitchell and Coffin and said plaintiffs; that the de-

fendants advised plaintiffs that there would be interference with their proposed projects of the defendants at Priest Rapids if plaintiffs proceeded with their plans, and that likewise the plans of plaintiffs at said time for power and irrigation did not require Federal approval, whereas proposals of defendants did require such approval; that a combination of defendants and plaintiffs could in all probability complete full power development and irrigation at Priest Rapids and that the plaintiffs, with their proposals and in their position with their plans and interests could [51] probably obtain some change in the objectionable Water Power Laws which adversely and directly affected the defendants, particularly the General Electric Company.

IX.

That in the spring of 1913 with knowledge of the acts, endeavors and accomplishments of said plaintiffs, the said defendants, General Electric Company, Electric Bond & Share and American Power & Light, and the said Dam Brothers, entered into a joint venture between all of the parties for the purpose of a complete power and irrigation development of the area heretofore described; that said joint venture was entered into in April, 1913, at 71 Broadway, New York City, New York, and said agreement between the defendant corporations and plaintiffs herein was oral and was never reduced to writing.

X.

That at the time of the entry of the parties into the joint venture set out in Paragraph IX of this complaint, it was agreed between defendants and plaintiffs that said plaintiffs would:

(a) Withhold plaintiffs' plans for the development which they proposed at Priest Rapids and join defendant, General Electric Company, and the other defendants, in a joint substitute plan for the single and full development of the Priest Rapids area for the benefit of defendants and plaintiffs.

(b) Help secure additional power site and industrial lands which would be turned over to defendants for the purpose of constructing the dam which would be constructed by defendants upon the passage of necessary Federal legislation.

(c) Make available to the defendants all of plaintiffs' records, investigations, field work and knowledge as it related to resources, minerals, materials, power, irrigation, etc.

(d) Jointly acquire with the defendants the 55,000 acres [52] controlled by plaintiffs which was part of plaintiffs' original project and would jointly work with and continue control of private lands and private landowners, and protect thereby the plaintiffs' plans for irrigation and defendants' plans for power development and industrial expansion.

(e) Employ plaintiffs' resources, connections and proposals to obtain favorable water power legislation which would permit the construction by the

defendants of a dam at Priest Rapids, and would help in the education and promotion of the project with county, state and federal officials so that the complete joint development of the project as a power generating project and irrigation development plan could be accomplished, and so that a wide, diversified manufacturing and farming community could be developed.

XI.

That at the time of the entry of the parties hereto into the joint venture, it was agreed by the defendants with plaintiffs that:

(a) The plaintiffs would receive Five Hundred Thousand Dollars ($500,000) of the common stock of Priest Rapids Power Company which defendants would incorporate for a sum of approximately $40,000,000 upon the passage of favorable power legislation.

(b) That plaintiffs were to own a large percentage of a land holding syndicate to be formed immediately and which was to purchase the 55,000 acres of land controlled by said plaintiffs and said plaintiffs were to jointly control said land with the defendant corporations and their various officials.

(c) That plaintiffs were to receive a 10% interest in a Townsite Terminal Company which was to include industrial, business, residential and terminal property operations and which was to be incorporated upon the formation of the power company.

(d) That plaintiffs were to receive 10% interest in all the other various syndicates and companies to be organized for the [53] purpose of acquiring minerals, resources, etc., in connection with the Priest Rapids development.

(e) That defendants would furnish funds for the activities and expenses during the preconstruction period, and during the period of the legislative work, and the defendants likewise promised that their activities in behalf of said plaintiffs would be commenced and pursued following favorable legislation by the Congress of the United States.

XII.

That the plaintiffs have duly performed each and every obligation and term of the joint venture on their part to be performed and said plaintiffs did co-operate and perform along with the defendants all of the incidental and substantial acts required to be done and performed in securing for all of the parties herein the proposed objectives of the co-adventure; that pursuant thereto there was formed the land syndicate with agreement as to division of ownership between defendants and plaintiffs and agreement as to the unit voting of the respective interests and with full agreement as to the ultimate management of the lands following favorable water power legislation; that likewise certain ownership of lands was combined and acquired by the co-adventurers to preclude interference in the plans of the co-adventurers by other interested parties or individuals and plaintiffs also made available to the

defendants knowledge of the assets of valuable tufa deposits which were to be acquired and employed and used in securing the ultimate objectives of the co-adventurers.

XIII.

That likewise in the performance of the operations undertaken by plaintiffs, they did then undertake to aid, assist and secure certain legislation in the Federal Congress for a dam at Priest Rapids and finally did contribute directly and materially to the passage of such legislation when the Second Session of the [54] 66th Congress passed the Water Power Bill in March, 1920, despite delay in the procurement of said legislation due to conflicting views on the types of legislation which existed between plaintiffs and defendants.

XIV.

That thereafter application for permit for the dam at Priest Rapids was filed by the General Electric and defendant Electric Bond & Share in the name of said defendants' agent and dummy, the said Washington Irrigation & Development Company.

XV.

That on March 3, 1921, the Federal Power Commission issued a permit for the dam at Priest Rapids as Power Project No. 3 and the said defendants, Electric Bond & Share, and General Electric Company, undertook diamond drilling of the dam foundation and proceeded with engineering work and plans in the engineering offices of the

respective defendants in New York City; that the field work and engineering plans for said dam were completed in June, 1922, and defendants and Sidney Z. Mitchell strongly requested that the plaintiffs proceed and complete the irrigation engineering for the Priest Rapids Highlands project for the purpose of providing irrigation for approximately 135,000 acres of land, which included the holdings of plaintiffs and defendants in the land-holding syndicate company which had been formed by said parties; that plaintiffs upon the assurance of the defendants and of Sidney Z. Mitchell expended large sums of money for the irrigation work and assisted materially in raising funds, and paying funds of plaintiffs to acquire such land as was necessary and to perform such engineering as was required and suggested by the defendants and Sidney Z. Mitchell.

XVI.

That on March 25, 1925, the Federal Power Commission issued a license for the dam at Priest Rapids to be constructed by the defendants; that at said time, however, defendants and all of them, [55] had embarked upon an expansion of their electrical industries and stock promoting scheme, and there was vast and immediate increase in manufacturing electrical appliances, and in construction of utility properties, and in the acquiring of utility properties, and in their use in activities of industry and agriculture, and the assets of the defendants, and each of them, grew to enormous proportions, and such expansion was substantially a result of the

efforts expended by plaintiffs herein pursuant to the agreement of joint venture heretofore made and described in this complaint; that the defendants, however, did not then proceed with the construction of the dam at Priest Rapids, and prior to the time that construction could begin there had occurred a general depression in the United States, and a failure therefor of the prosecution of a vigorous government policy in the construction of large hydroelectric projects, which period of time was followed by World War II with restrictions on the development and use of labor, materials, etc., which likewise materially impeded the progress in reaching the objectives of the co-adventurers; that during and following such period and thereafter, the defendants, represented to said plaintiffs that they were continuing with said co-adventure.

XVII.

That, however, the defendants were engaging in activities which were adverse to the interests of the co-adventure and said defendants were not performing at said time in accord with the obligations assumed by said defendants at the time of the making of the agreement of co-adventure; that such facts were not known by plaintiffs at said time, nor could they be so known; that none of defendants did state, nor did they represent at any time to said plaintiffs, that they were in anywise abandoning the prosecution of the co-adventure; that the plaintiffs herein did not and could not know that there was any complete or final repudiation or abandonment

of the agreement of co-adventure until some time in the [56] early part of the year 1951 when plaintiffs learned that defendants, and all of them, did not intend to proceed with the development of the Priest Rapids project or with the prosecution of any of the obligations assumed by them; that therefore a written demand was made by plaintiffs on June 14, 1951, for full settlement to be made by defendants with plaintiffs in accord with the agreement of co-adventure, the fulfillment of the obligations of which had occupied the efforts and acts of the plaintiffs from 1913 until the year 1951; that therefore plaintiffs believe and allege that the purpose of said joint venture is now incapable of performance because the said defendants, and each of them, have breached the terms thereof and have repudiated the same to the damage of the plaintiffs herein.

XVIII.

That as a direct and proximate result of defendants' breach of the joint-venture agreement, the plaintiffs have suffered loss and damage as follows:

1.	Priest Rapids Power Company, common stock	$ 500,000.00
2.	10% interest, Townsite Terminal Co., common stock	250,000.00
3.	10% interest, Limestone Company, construction supply-chemical works user	100,000.00
4.	30% interest, Tufa Natural Cement Co., common stock	50,000.00

5.	Hydro-Chemical Operations	90,000.00
6.	Expectant contemplated profits and development of materials, electrical furnace, chemicals, industries and wood products	300,000.00
7.	Land—Syndicate, 50,000 acres (3 rural townsites, completely engineered project), 30% of total profit	900,000.00
8.	Engineering 135,000-acre project, irrigation, power, etc.....	250,000.00
9.	Private owned lands, Highlands..	750,000.00
10.	Offices, laboratory, ranches, equipment, livestock, homes, autos.....	160,000.00
11.	Mines, mineral lands, research engineering, professional records, maps and reports.....	200,000.00
		$3,550,000.00

and the plaintiffs have suffered further damage as a result of defendants' [57] breach as heretofore alleged to finances and credit, loss of business and engineering opportunities, activities and operations, loss of value of professional and business records, use of the knowledge and time in a sum total of $5,000,000.00, or in a total in all of $8,550,000.00.

For a second cause of action, plaintiffs complain and allege as follows:

I.

Plaintiffs reallege Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, and XVII of their first cause of action as though fully set out herein.

II.

That defendants and all of them did use and employ the efforts of plaintiffs during the co-adventure between said parties and the results obtained by said plaintiffs in effecting favorable legislation and otherwise heretofore pleaded in plaintiffs' first cause of action for the purpose of making and obtaining for the defendants, and each of them, huge profits through the expansion of their facilities and said defendants did make use of, for their own benefit, the various accomplishments of the plaintiffs in procuring for the said defendants, and each of them, to the exclusion of the plaintiffs, great and immense profits in their enterprises, the value of which cannot now be determined by these plaintiffs.

Wherefore, plaintiffs pray for:

1. Judgment herein against the defendants, and each of them, on plaintiffs' first cause of action for the sum of $8,550,000.00, together with their costs and disbursements herein.

2. That an accounting be taken of all the affairs alleged herein in plaintiffs' second cause of action and that plaintiffs be given damages in an amount

deemed equitable by the court in [58] respect to the contributions made by said plaintiffs herein.

3. For such other and further relief as to the Court may seem just and equitable.

/s/ R. MAX ETTER,

/s/ ROBERT L. BELL,

/s/ HARVE H. PHIPPS,

Attorneys for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed November 15, 1952. [59]

[Title of District Court and Cause.]

MOTION TO DISMISS AMENDED COMPLAINT

Defendant American Power & Light Company moves the court as follows with respect to plaintiffs' amended complaint herein:

I.

To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

II.

To dismiss the action or in lieu thereof to quash the return of service of summons on the ground:

(a) That the defendant is a corporation organized under the laws of the State of Maine and was not and is not subject to service of process in the Eastern District of Washington nor in the State of Washington; and,

(b) That the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavit of Howard L. Aller, annexed to this defendant's original motion to dismiss and on file herein.

III.

To dismiss the action on the ground that it is in the wrong [60] district because:

(a) The judisdiction of this court is invoked solely on the ground of diversity of citizenship and neither all the plaintiffs nor all the defendants reside in the Eastern District of Washington; and,

(b) All the defendants are indispensable parties and Electric Bond and Share Company is also an indispensable party and neither this defendant nor Electric Bond and Share Company is subject to service of process in the Eastern District of Washington, nor in the State of Washington, all of which more clearly appears in the affidavit of Howard L. Aller, attached as Exhibit A to this defendant's original motion to dismiss and the motion to dismiss of defendant Electric Bond and Share Company, both of which are on file herein to which reference is hereby made. All defendants are subject to suit in the State of New York.

/s/ ALAN G. PAINE,

/s/ ALAN P. O'KELLY,

Attorneys for Defendant American Power & Light Company.

[Endorsed]: Filed December 3, 1952.

[Title of District Court and Cause.]

COURT'S ORAL RULING ON MOTIONS TO DISMISS

Be It Remembered that the above-entitled cause came on for hearing at Spokane, Washington, on November 17, 1952, for hearing on motions to dismiss, before the Honorable Sam M. Driver, Judge of the above-entitled Court; the plaintiffs being represented by Harve H. Phipps and R. Max Etter; the defendants being represented by Philip S. Brooke and Alan G. Paine, all of Spokane, Washington; and the following is the Court's oral ruling on the motions:

The Court: I think the Court is sufficiently [61] in doubt so that all of these people should be kept in. I don't know what would happen in the final outcome of the lawsuit, but I don't want to let out somebody and then have it develop that the wrong one has been let out. Perhaps that might be a rather practical way to view it, but, while I am very much in doubt as to liability here, I think that for the purposes of these motions, I will deny the motions and leave all these companies in. Then we will see what happens.

Mr. Paine: Do I understand from that that your Honor feels that the mere mailing of an uncertified copy of the complaint by Mr. Phipps to Electric Bond and Share——

The Court: Well, now, let's see, which one do you have in mind, Mr. Paine?

Mr. Paine: Electric Bond and Share. I think there is no question that Electric Bond and Share——

The Court: What do you say about that?

Mr. Etter: They may have been out, I don't know about proper service.

The Court: I think that that is an improper service, yes. If you want to put it down to that one, I think that that is an improper service and the service will be ordered quashed on Electric Bond and Share.

Now, do you have any other particular one?

Mr. Paine: Well, I still feel very strongly that the [62] service should be quashed on American Power and Light.

The Court: What was the service on American Power and Light?

Mr. Etter: Washington Irrigation and Development Company.

Mr. Paine: They served the agent of the Washington Irrigation and Development Company.

Mr. Etter: Served the company itself. That is 100 per cent owned by American Power and Light.

The Court: Well, I will hold that that is good, but your——

Mr. Paine: Electric Bond and Share.

The Court: Your motion is granted on that.

Court will adjourn then until tomorrow morning at 10:00 o'clock. [63]

Reporter's Certificate

United States of America,
Eastern District of Washington—ss.

I, Donald B. Oden, do hereby certify:

That at all times herein mentioned I was the duly appointed, qualified and acting official court reporter of the United States District Court for the Eastern District of Washington; that as such reporter I reported in machine shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, United States District Judge, held at Spokane, Washington, on November 17, 1952; that the within and foregoing is a full, accurate and complete transcript of the Court's ruling on the motions on this date.

Dated this 23rd day of February, 1957.

/s/ DONALD B. ODEN,
Official Court Reporter.

[Endorsed]: Filed February 26, 1957. [64]

United States District Court for the Eastern District of Washington, Northern Division

No. 1036

MILTON E. DAM and EVERETT S. DAM, Co-partners Doing Business Under the Firm Name and Style of DAM BROTHERS,

Plaintiffs,

vs.

GENERAL ELECTRIC COMPANY, a Foreign Corporation; AMERICAN POWER & LIGHT COMPANY, a Foreign Corporation, and ELECTRIC BOND & SHARE COMPANY, a Foreign Corporation,

Defendants.

OPINION OF THE COURT

Driver, Chief Judge.

Defendant American Power and Light Company, hereafter called American, by its motion to quash the return of service of process and to dismiss the action, questions the sufficiency of the service and its own amenability to service, within the State of Washington. The action was commenced by the filing of the complaint, on July 16, 1952. The return of service shows that, on the following day, the summons and complaint were served upon American by handing copies thereof to the statutory agent of the Washington Irrigation and Development Company, at Vancouver, Washington.

The pertinent facts are set forth in the amended complaint and in an affidavit of Howard L. Aller, president of American. These documents, as counsel on both sides seem to agree, may be considered by the court in the light of the related information contained in the published reports of the Securities and Exchange Commission and the federal courts dealing with the creation, the corporate structure, and the interrelationship of the three corporations named as defendants in the present action.[1]

So far as it is necessary to consider them here, the allegations of the amended complaint are as follows:

The defendants General Electric Company (referred to herein as General) and Electric Bond and Share Company (hereafter designated Bond and Share) are New York corporations. Defendant American is a Maine corporation, which is doing business in the State of Washington. At all times mentioned (which covers a period from prior to 1913 to July, 1952), General and American have wholly controlled the Washington Irrigation and Development Company, a Washington corporation, and have used it as a "dummy" and instrumentality, so that they could perform their respective

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[1]In re Electric Bond & Share Co., et al., 11 Securities and Exchange Commission decisions and reports, 1146; American Power and Light Co. v. Securities and Exchange Commission, 1 Cir., 141 F. 2d 606; American Power and Light Co. v. Securities and Exchange Commission, 329 U. S. 90.

businesses through and by it. Prior to and at the time of the commencement of the action, the Washington corporation was owned by American and was being used by it in the same manner and for a like purpose. In April, 1913, all three defendants and the plaintiffs, in the City of New York, entered into an oral joint venture agreement for the construction of a dam and hydroelectric power plant, at the Priest Rapids site, on the Columbia River, in the State of Washington, and for the irrigation of a large area of adjacent, arid land. Prior to the making of the agreement, plaintiffs had done considerable preliminary development work. General had "made certain investments in the Priest Rapids power site" and had acquired certain nearby land which it "held, owned and controlled through its dummy, Washington Irrigation and Development Company." After the joint venture agreement had been made, General and Bond and Share, in the name of their "agent and dummy," Washington Irrigation and Development Company, applied for a permit for construction of the dam at Priest Rapids and the Federal Power Commission issued a permit on March 3, 1921. Bond and Share and General then "undertook diamond drilling of the dam foundation" and proceeded with engineering work and plans in the engineering offices of the respective defendants in New York City. The field work and engineering plans [91] for the dam were completed in June, 1922. On March 25, 1925, the Federal Power Commission issued a license for the dam. Construction was long delayed, however, by

various enumerated conditions and events, and, ultimately, defendants abandoned and breached the joint venture agreement, to plaintiffs' damage in a very large sum.

Summarized briefly, the factual recitals in the affidavit of Mr. Aller, the president of American, are as follows:

American was created under the laws of the State of Maine, September 20, 1909. Throughout its entire corporate existence, it has had its principal office in Augusta, Maine. It has also maintained an office in New York City, but has had no other office, and, specifically, has not maintained any place of business in the State of Washington. The corporation has always been a holding company, engaged in the business of acquiring, in New York State and interstate commerce, and holding for investment and realization thereon, the securities of public utility companies operating in various states, including the State of Washington; but it has never conducted any of "its ordinary or regular business" in that state. The Securities and Exchange Commission, acting pursuant to the Public Utility Holding Company Act of 1935, by an order dated August 22, 1942, directed that the existence of American be terminated and the corporation dissolved. The order was affirmed successively by the United States Court of Appeals for the First Circuit and the Supreme Court.[2] Since November 25, 1946, the date

[2]For case citations, see Footnote 1.

of the Supreme Court decision, American has been in process of dissolution. The corporation owns no property in the State of Washington. It owns all of the outstanding capital stock and debt securities of the Washington Irrigation and Development Company, whose only assets in Washington are some lands, largely uncultivated and idle, and certain securities of the Limestone Company, a Washington corporation, which owns real estate in the State of Idaho. The Washington Irrigation and Development Company transacts no business, except the incidental leasing of minor portions of its real estate. It engages in no business whatsoever on behalf of American, and, at no time, has it transacted or engaged in business as agent or representative of American. Pursuant to an order of the Securities and Exchange Commission, dated June 6, 1952, and an order of the United States District Court for the district of Maine, dated July 17, 1952, American will dispose of all of its interest in the Development Company. The books and records of the two corporations are kept "separate and distinct." American has never qualified as a foreign corporation under the laws of the State of Washington. It has never maintained, appointed, or located any officer or managing or general agent in Washington to conduct its business or receive service of process; and, for several years, it has entered into no commercial transactions whatsoever in that state.

This is a civil action, governed, as to the manner, of service of process, by the Federal Rules of Civil

Procedure. The rules provide that service shall be made upon a foreign corporation by delivering a copy of the summons and of the [93] complaint to an officer, a managing or general agent, or to any other agent, authorized by appointment or by law to receive service of process.[3] The rules further provide, however, that it is sufficient if the summons and complaint are served on a foreign corporation defendant in the manner prescribed by the law of the state in which the service is made for the service of summons on any such defendant in a state Court action.[4] The applicable Washington statute recites that summons shall be served upon a foreign corporation, "doing business within the state" by delivering a copy thereof to any agent, cashier, or secretary thereof.[5]

In the present case, as stated above, American was served by delivery of the summons to the statutory agent of Washing Irrigation and Development Company, a wholly owned subsidiary of American. The service was insufficient to meet the requirements of either the Federal Rules or the State Law, unless we disregard the separate corporate entity of the domestic corporation and regard service upon it as, in legal effect, service upon American.

It is a well established general rule that a foreign corporation, which owns or controls the capital stock

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[3]Fed. Rules Civ. Proc. Rule 4 (d)(3), 28 U.S.C.A.

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[4]Fed. Rules Civ. Proc. Rule 4(d)(7), 28 U.S.C.A.

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[5]RCW 4.28.08(9).

and dictates the policies and directs the affairs of a subsidiary corporation, which is doing business within a state, is not [94] thereby subject to service of process through service upon an agent of the subsidiary in that state. A leading case is Cannon Manufacturing Company v. Cudahy Packing Company, 267 U. S. 333.[6] There, as in the present action, a foreign corporation was served with process by service upon the agent of its subsidiary corporation, doing business within the state of service. Cudahy, a Maine Corporation, used the wholly owned and completely dominated subsidiary corporation, Cudahy of Alabama, to market the parent company's products in North Carolina. In its opinion, the Court observed that the device of doing business in North Carolina through the subsidiary was, doubtless, adopted solely to secure some advantage to the parent; but it pointed out that the distinct corporate entity of the subsidiary was in all respects observed. The Court concluded that the corporate separation, although "perhaps merely formal, was real" and not "pure fiction" and held that the defendant parent corporation was not subject to service of process in North Carolina.

Cannon v. Cudahy, supra, has never been overruled. It was relied upon and followed by the Ninth Circuit Court of Appeals in the recent case of Gravely Motor Plow & Cultivator Co. v. H. V. Carter Co., 193 F. 2d 158. The Supreme Court of

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[6]For other cases in which the rule has been applied, see annotation, 18 A.L.R. 2d, 187, 194.

Washington also applied the general rule, stated above, in State v. Northwest Magnesite Co., 28 Wn. (2d) 1, 40, and, in so doing, cited Cannon v. Cudahy, as a supporting authority.[7] [95] The author of the American Law reports annotation[8] states, by way of exception to the general rule, that, if there are facts in addition to stock ownership sufficient to convince the Court that the form of corporate separation is a mere fiction, and the subsidiary corporation is only an adjunct or instrumentality of the foreign parent corporation, then the parent will be regarded as doing business in the state and subject to its jurisdiction for the service of process. The statement is deceptively simple. The difficulty arises when the test, whether the subsidiary is a mere adjunct or instrumentality of the parent, is applied to a particular set of facts. The cases in which the corporate separation has been disregarded have taken a wide range. It is difficult to classify them, but they do support the general conclusion that there must be a showing of something more than complete control and direction of the subsidiary by the parent. Absolute domination, through capital stock ownership and its incidents, is not alone sufficient, even though the subsidiary is the instrumentality employed by the parent for the transaction of the latter's busi-

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[7]Another case factually similar to the case at bar, in which Cannon v. Cudahy was followed, is Lane v. Maple Leaf Milling Co., 87 F. Supp. 741.

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v. Maple Leaf Milling Co., 87 F. Supp. 741.

ness within the forum state. In this connection, attention is again directed to Cannon v. Cudahy, supra. There, the parent, for its own advantage, used the subsidiary corporation as a medium for the Transaction of business in North Carolina, and the completeness of the subservience of the subsidiary appears in the following quotation from the opinion, at page 335: [96]

> Through ownership of the entire capital stock and otherwise, the defendant [the parent corporation] dominates the Alabama Corporation [the subsidiary], immediately and completely; and exerts its control both commercially and financially in substantially the same way, and mainly through the same individuals, as it does over those selling branches or departments of its business not separately incorporated which are established to market the Cudahy products in other states.

An exception to the general rule is recognized where a plaintiff seeks to hold a parent corporation liable for an act or omission of its subsidiary corporation, or to enforce against a subsidiary a liability of the parent, and the primary concern is with the enforcement of substantive rights. A number of cases, apparently regarded by the Court as within the exception, are cited and expressly distinguished in Cannon v. Cudahy, supra, page 337.

Another exception is recognized where a corporate subsidiary is used as an instrumentality or adjunct of the parent corporation for the accomplishment of

some illegal or fraudulent or dishonest purpose.[9] Commenting on the exceptions to the general rule in State v. Northwest Magnesite Company, supra, page 42, the Supreme Court of Washington expressed the view that "whether the Courts will disregard the corporate form is ultimately a question of whether there is good faith and honesty in the use of corporate privilege for legitimate ends." In support of the statement, the Court cited [97] Sommer v. Yakima Motor Coach Co., 174 Wash. 638, 26 p. (2d) 92 and McCurdy v. Spokane Western Power & Traction Co., 174 Wash. 470, 24 P. (2d) 1075. In the first of the cited cases (opinion, page 654), the Washington Court said that two corporations "are not to be adjudged as one, in legal effect, unless their property rights and interests are so closely commingled and related as to render it apparent that they are intended to function as one, and to regard them separately would aid the consummation of a fraud or wrong upon others."[10] In the other cited case, the same Court, at page 496 of the opinion, made this observation:

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[9]Dobson Corp. v. Farbenfabriken Co. of Elberfeld Co., 206 F. 125. See also Hazeltine Corp. v. General Electric Corp., 19 F. Supp. 898, 903, and Industrial Research v. General Motors, 29 F. 2d 623, 627. The case last cited is an example of an action against a parent corporation for patent infringement by manufacture or sale of the patented device through controlled subsidiary corporations.

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[10]See also First National Bank v. Walton, 146 Wash., 367; Briggs & Co. v. Harper Clay Products Co., 150 Wash., 235.

> In adjudicating two corporations to be, in legal effect, one, it must appear that the one so dominates and controls the other as to make the other a mere tool or instrument of the one, so that justice requires the dominant corporation to be held liable for the results, and further, that there shall be such a commingling of their funds and property interests, and their affairs so intimately related in management, that to consider them other than as one would work a fraud upon third persons.

It does not appear that American has had any contacts in the State of Washington, except through its subsidiary corporations.[11] If it is subject to service of process in the instant case, it must be because of its connections with Washington Irrigation and Development Company. Plaintiffs base their claim for relief upon a joint venture agreement, made with American directly, in the State of New York, after the [98] Washington Irrigation Company had been created. They do not seek to hold American liable for any acts or omissions of the subsidiary. There is no contention that the organization of the Washington Corporation, or its use by American, was illegal, dishonest, or fraudulent. The amended complaint alleges that the subsidiary was a "dummy" and instrumentality, employed by American and the other defendants for the transaction of

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[11]American owns all of the capital stock of another domestic corporation, The Washington Water Power Company, which is not involved in the present action.

their business within the State of Washington, it is true; but such general allegations go no further than to show complete domination and control of the subsidiary by the parent, through stock ownership and otherwise, such as existed in Cannon v. Cudahy. There is no showing of additional facts sufficient to take the present case out of the operation of the general rule. On the other hand, Mr. Aller's affidavit states that the business conducted by the subsidiary is entirely different and separate from that of American, that the subsidiary has never transacted or engaged in business as the agent or representative of American, and that the books and records of the two companies are kept separate and distinct. It must be concluded, therefore, that American was not served with process effectively by the delivery of a copy of the summons to the statutory agent of its subsidiary corporation.

The motion under consideration, however, raises a broader issue than the procedural sufficiency of the service of process upon American. Even if service had been made in the manner prescribed by the civil rules and the Washington Statute, jurisdiction would not be vested in this Court, unless the requirements of due process of the United States Constitution [99] have been satisfied.[12] Such re-

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[12]Peoples' Tobacco Co. v. American Tobacco Co., 246 U. S. 79; Chipman, Ltd., v. Jeffery Co., 251 U. S. 373; Bomze v. Nardis Sportswear, 165 F. 2d 33, 35; Favell-Utley Realty Co. v. Harbor Plywood Corp., 94 Fed. Supp. 96, 98.

quirements have been discussed by the Supreme Court on many different occasions. The cases differ widely as to their facts, and it has often been said that each case must depend upon its own particular circumstances. But in People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 87, the Court formulated a general principle to the effect that a foreign corporation must be doing business in a state to be subject to service of process there, and "the business must be of such a nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is, by its duly authorized officers or agents, present within the state or district, where service is attemped." Although the cited case and others of like purport have not been overruled, the modern trend of judicial thought appears to be toward a more liberal interpretation of what consititutes doing business by a foreign corporation. In one of the later cases, International Shoe Co. v. Washington, 326 U. S. 310, the Supreme Court, citing many of its prior decisions dealing with due process, made the following observations (pages 316 to 319): A corporation has a fictional personality and, therefore, can be present in a state only through the activities of its representatives or agents. The demands of due process may be met by such contacts or activities of the corporation, through its agents, "with the state of the forum as to make it reasonable, in the context of our [100] Federal System of Government, to require the corporation to defend the particular suit which is brought there." Presence of a corporation in the

state, in this vicarious sense, has never been doubted when its activities have "not only been continuous and systematic, but also give rise to the liabilities sued on." On the other hand, "the casual presence of the corporate agent, or even his conduct of single or isolated items of activities in a state, in the corporation's behalf, are not enough to subject it to suit on causes of action unconnected with such activities." The test is essentially qualitative rather than quantitative. Whether due process requirements have been met depends upon the quality and nature of the activity "in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." It is not in accord with due process to render in a state a judgment in personam against a corporate defendant "with which the state has no contacts, ties, or relations."

It fairly appears, without more extensive review of the authorities, that the minimum requirements necessary to satisfy due process, where the action is not based upon any activities of the foreign corporation within the forum state, are that there must be some substantial business activity carried on by such corporation within the state, and the activity must amount to more than casual, isolated, or disconnected transactions, or the mere presence in the state of a passive agent or agency of the corporation.

As has been pointed out, plaintiff's action is based upon a breach of a joint venture agreement, not

upon any [101] business activity of American within the State of Washington. The amended complaint states the conclusions that American "is doing business in the State of Washington" and that it has used its subsidiary, Washington Irrigation and Development Company as a "dummy" and instrumentality for the transaction of its business; but there is no specific allegation that American has performed any business act, or carried on any business activity in the state, either directly or through a subsidiary corporation. The only showing in the amended complaint of any particular business activity carried on through the Washington Irrigation and Development Company consists of allegations to the effect that General acquired lands near Priest Rapids, which it held, owned, and controlled through the Washington Company as its dummy, and that General and Bond and Share applied for a permit to build a dam at Priest Rapids through the Washington Corporation, as their agent and dummy. On the other hand, it appears from the affidavit of American's president that, since November 25, 1946, American has been in the process of dissolution and has entered into no commercial transactions in the State of Washington for the last several years. It seems clear that minimum due process requirements have not been met.

The motion of defendant American is granted.

[Endorsed]: Filed April 7, 1953. [102]

[Title of District Court and Cause.]

NOTICE OF HEARING ON MOTION FOR LEAVE TO SERVE AND FILE SECOND AMENDED COMPLAINT

To the Above-Named Defendants, and to Hamblen, Gilbert & Brooke and Paine, Lowe & Coffin, Their Attorneys:

You, and each and all of you will please take notice that the plaintiffs will present to the court in the above-entitled action and bring on for hearing and determination by the court the attached Motion for Leave to Serve and File Second Amended Complaint, together with the affidavit of Harve H. Phipps and plaintiffs' proposed Second Amended Complaint thereto attached, on the 5th day of November, 1953, at the hour of 10:00 o'clock a.m. of that day, or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled court, in the city and county of Spokane, State of Washington.

Dated this 30th day of October, 1953.

/s/ R. MAX ETTER,

/s/ ROBERT L. BELL,

PHIPPS & PHIPPS,

Attorneys for Plaintiffs.

Service of copy acknowledged.

[Endorsed]: Filed October 31, 1953. [103]

[Title of District Court and Cause.]

ORDER ON MOTION FOR LEAVE TO SERVE AND FILE SECOND AMENDED COMPLAINT

This cause came regularly on for hearing before the undersigned Judge of the above-entitled court on this 5th day of November, 1953, on the plaintiffs' Motion for Leave to Serve and File Their Second Amended Complaint herein, the plaintiffs appearing by and through their attorney, Harve H. Phipps, and the defendant, General Electric Company, a corporation, appearing by its attorneys Hamblen, Gilbert & Brooke, Phillip S. Brooke appearing, and said motion, with plaintiffs' said Proposed Second Amended Complaint having been presented to the court, and the same was duly argued and considered by the court, and the court being duly advised.

It Is Ordered that the plaintiffs be and they are hereby granted leave to serve and file herein, and to amend their complaint as in said Amended Complaint set forth, and that said Second Amended Complaint do stand and be considered by the court as the plaintiffs' complaint herein.

It Is Further Ordered that the service of said Second Amended Complaint herein on the defendants with the said Motion for leave to serve and file herein their said Second Amended Complaint, do stand as service of said Second Amended Complaint, and,

It Is Further Ordered that the defendants, or any or [104] all of them, do have to and including twenty days from the date of this Order, within which to answer, respond to or move against said Second Amended Complaint.

Dated and done at Spokane, Washington, this 5th day of November, 1953.

/s/ SAM M. DRIVER,
Judge of United States
District Court.

Presented by:

PHIPPS & PHIPPS,
Attorneys for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed November 5, 1953. [105]

In the District Court of the United States for the Eastern District of Washington, Northern Division

No. 1036—Civil

MILTON E. DAM and EVERETT S. DAM, Co-Partners Doing Business Under the Firm Name and Style of DAM BROTHERS,

Plaintiffs,

vs.

GENERAL ELECTRIC COMPANY, a Foreign Corporation; AMERICAN POWER & LIGHT COMPANY, a Foreign Corporation; and, ELECTRIC BOND & SHARE COMPANY, a Foreign Corporation,

Defendants.

SECOND AMENDED COMPLAINT[1]

Come now the plaintiffs and for their First Cause of Action against the defendants complain and allege:

I.

The plaintiffs are now and at all times herein mentioned have been citizens and residents of the State of Washington.

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[1][In conformity with the Court's Order of Sept. 14, 1955 (See pages 100-101 of this printed record), certain portions of this Second Amended Complaint are stricken by drawing a line through same without rendering it illegible and by interlineation.]

II.

The Court has jurisdiction of the above-entitled action for the reason that there is a diversity of citizenship of the parties to this action, the plaintiffs being citizens and residents of the State of Washington, and each and all of the defendants being corporations organized and existing under laws foreign to the State of Washington, and the matters in controversy exceed the sum of three thousand dollars ($3,000.00) exclusive of interest and costs.

III.

The defendant, General Electric Company, as a foreign corporation, has complied with the laws of the State of Washington relating to foreign corporations, and is and has been duly authorized and licensed to transact business in the State of Washington, and has paid its license fees to date. [1*]

IV.

The defendant, General Electric Company, was incorporated and chartered under the laws of the State of New York on or about April 15th, 1892, with its home office and principal place of business in the City of Schenectady, County of Schenectady, State of New York; that the principal objects and purposes for which said General Electric Company was incorporated, chartered and organized were for the manufacture, development, improvement, production and sale of electrical equipment, appliances, motors, turbines for use in the production of elec-

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

trical power and current, wires and cables to be utilized in the transmission of electrical current, and generally to engage in all phases of the business of manufacturing and producing articles and things to be used and useful in the utilization of electrical power and energy and/or other types of power, such as water, steam, gasoline and kindred powers, the said corporation, General Electric Company, being what is commonly known and designated a "manufacturing company."

V.

On or about the 27th day of February, 1905, the defendant, General Electric Company, acting by and through its duly qualified and authorized directors and officers, caused to be incorporated under the laws of the State of New York the defendant, Electric Bond & Share Company, for the apparent and ostensible object and purpose, on the part of the said General Electric Company (1) to realize as fully as possible upon various utility securities which it had acquired in the process of selling and disposing of its manufactured equipment; (2) to obtain for itself, the said General Electric Company, a direct proprietary stake or interest in a promising young industry, that is to say the production and development of electrical and other power, with which industry it was then closely related and affiliated, and; (3) to utilize the position it would acquire as a proprietary factor in the utility [2] industry to capitalize and advance the sales of equipment and appliances manufactured, developed and

improved, or to be manufactured, developed or improved by said General Electric Company, and as these plaintiffs are informed and believe and therefore allege the General Electric Company originally invested in and turned over to said Electric Bond & Share Company the sum of approximately one million three hundred thousand dollars ($1,300,000.00) in cash, and assigned, transferred and set over to said Electric Bond & Share Company miscellaneous securities it then owned having a par value of approximately four million, two hundred fifty-eight thousand, one hundred fifty dollars ($4,258,150.00), in return for which the said Electric Bond & Share Company issued and delivered to said General Electric Company all of its authorized and outstanding capital stock of said Electric Bond & Share Company, consisting of two million dollars ($2,000,000.00) par value of its common stock and two million dollars ($2,000,000.00) par value of its preferred stock, and thereby the General Electric Company became the company holding all of the issued and outstanding common and preferred stock of said Electric Bond & Share Company, and was and became what is commonly known and described variously as the "holding company," the "parent company," or the "dominant company," and by and through such stock ownership, and the voting rights and powers reposed in it by reason of such stock ownership, the said General Electric Company in all things dominated and controlled the management, activities, acts and actions of the defendant, Electric Bond & Share Company, and by such domi-

nation and control the defendant, General Electric Company, used the purported corporate entity of the defendant, Electric Bond & Share Company for its own uses and purposes ., and there was thereby created a confusion of corporate entities so as to mislead and deceive third persons dealing with the said defendant, Electric Bond & Share Company, and the purported corporate entity of said Electric Bond & Share [3] Company was in truth and in fact a fiction, and the fiction of such purported separate legal entity of the defendant, Electric Bond & Share Company, was used by the defendant, General Electric Company, as a means in perpetrating an ostensible fraud and deception upon persons dealing with the said Electric Bond & Share Company, a purported separate legal entity, incorporated, organized and existing for the declared objects and purposes, among others, of buying, selling, handling and dealing in bonds and other securities, principally of utility companies, and was in truth and in fact a mere tool or business conduit of the defendant, General Electric Company, through which the said defendant, General Electric Company, utilized and employed it as a means of perpetrating a monopoly not only for the sale and distribution of its manufactured electrical equipment, appliances and products, but, as hereinafter set out, to monopolize the creation, production and manufacturing of electrical and other power, and the distribution of the same, and the development and use of water and water power for irrigation and other purposes, and the procuring of sites, lands and min-

eral deposits, building and other materials, useful and to be used in the development of power projects, in all of which ventures the said dominant or parent corporation, General Electric Company, used and utilized the defendant, Electric Bond & Share Company for the purpose of financing and raising funds by the sales of bonds and other securities to the investing public, and as the direct and proximate result of its domination and control of the said said Electric Bond & Share Company, and the financial aid and assistance created for the General Electric Company by the defendant, Electric Bond & Share Company, said General Electric Company was able to and did become the world's largest manufacturer of electrical appliances and equipment, dominating and monopolizing a great or major portion of the field of such industry, and in addition thereto, as hereinafter set out, created and dominated [4] the field of the manufacturing and distribution of electrical energy and power as well as developing water power in the production, creation and manufacturing of such electrical energy and power, all of which was made possible through the fiscal and financial agency of the defendant, Electric Bond & Share Company, so dominated and controlled by the defendant, General Electric Company, as herein set out.

VI.

Lying in the approximate south-central area of the State of Washington, in the area bounded by the Saddle Mountains on the north and east and by

the Columbia River on the west and south, there is a vast tract of land which, in its original and natural state, is and has been arid or semiarid, the soil of which is of a volcanic ash character, highly porous, and very productive when irrigated, but which, in its natural state, because of its location and the character of its soil is, and has been, unproductive and covered with sagebrush and other vegetation which could grow and thrive without irrigation; along the area herein-above referred to lies the Columbia River on the west and south sides thereof, flowing in a general southerly direction to a point approximately on the border line between the states of Washington and Oregon, and thence westerly to the Pacific Ocean, the said Columbia River entering the State of Washington near the northeast corner thereof, and because if its numerous tributaries to the north of the area herein above referred to, the said river has vast resources of water to be utilized and useful in the development of irrigation for the arid and semiarid lands above referred to, and when harnessed by a dam in said Columbia River, is capable of developing and generating and producing enormous electrical energy to be used and useful in the manufacturing and production of fertilizer, chemical products, pumping water for irrigation purposes, and other innumerable useful purposes. [5]

VII.

The area or tract above described as lying to the south of the Saddle Mountains and bounded as

above described has along its westerly boundary a portion of the Columbia River which, because of the country surrounding it and the vast amount of water behind it, is, in its natural state a swiftly moving stream, dropping rapidly in elevation, and is known as and called "Priest Rapids," and the project of developing the same for power and irrigation purposes is, and has been generally known as the "Priest Rapids Highlands Project."

VIII.

The plaintiffs herein are brothers and were raised from early childhood in the territory above described, and, about the turn of the Twentieth Century, about the year 1900, and prior and subsequent thereto, had visualized the vast possibilities of utilizing the Columbia River and harnessing the same, particularly at and in the area of the Priest Rapids to furnish irrigation for the adjacent lands lying to the east, to make the same productive for agricultural and kindred purposes, and with these objects and purposes in view, these plaintiffs made and caused to be made surveys, investigations, experiments, soundings and other determinations to determine the possibility and feasibility of diverting waters of the Columbia River to the area above referred to, to cause the same to be made productive and to generate power and electrical energy as above referred to, with the primary and principal end and object in view of making possible the irrigation of the lands above referred to, the increase in colonization, and the development of the territory

as an agricultural unit, and, secondarily, the object and purpose of these plaintiffs was to develop and utilize the said project for power purposes.

IX.

With the primary end in view of developing [6] such territory for agricultural, industrial and kindred purposes, the individuals, Milton E. Dam and Everett S. Dam, brothers as aforesaid, organized and entered into a partnership agreement with each other, about the year 1905, and thereafter operated under the partnership name of Dam Brothers, and by contributions of their individual assets and holdings to said partnership, and through their individual and joint efforts, said Dam Brothers acquired and controlled a vast acreage in the territory described as the Priest Rapids Highlands Project, and through the efforts of such partnership there was brought under its control aproximately one hundred thirty-five thousand (135,000) acres of land in such project, and representing aproximately one thousand (1,000) landowners therein.

X.

The Columbia River at the site of said Priest Rapids, and above and below the same, is and was a navigable river, and as originally contemplated by the plaintiffs, it was proposed to divert waters from such river for irrigation purposes, for which purpose it was and would not be necessary or required to establish more than water rights and did not and

would not be necessary to span the Columbia River with a dam or other obstruction to navigation.

XI.

For a time, covering a period of approximately three (3) years prior to the year 1913, the defendant, General Electric Company, had under consideration the project of developing the Priest Rapids site on the said Columbia River primarily as a source of electrical power and energy, for which purpose it would be necessary to span the said Columbia River from bank to bank and construct a high dam across said river, which, as above set out, was a navigable stream and by reason thereof was under the control of the Federal [7] Government.

XII.

In making its investigations and surveys to formulate plans to put into operation its proposed development of said Priest Rapids for power purposes, the General Electric Company learned that it would encounter considerable difficulty and run into obstacles, first, in that the plans and project of the plaintiffs, Dam Brothers, which had progressed to the point of realization within a very short time, were in conflict with the project and plans of the defendant, General Electric Company, and because of such conflicts the defendant, General Electric Company, would be unable to proceed with its project, and second, because of the fact that the Columbia River was a navigable stream and because of Federal laws then in effect affecting and

relating to power projects on and across navigable streams, the project and plans of the defendant, General Electric Company for the development of said Priest Rapids as a power site could not be advantageously accomplished, and was not feasible unless or until Federal laws affecting the development of the power site at Priest Rapids were changed or altered to make the plans and project of the General Electric Company feasible, principally as to the period or length of time for which a license or permit could be obtained.

XIII.

On learning of these obstacles and the Federal laws restricting and affecting the development and prosecution of its plans and the project at said Priest Rapids, the defendant, General Electric Company, through its officials and agents approached and contacted the plaintiffs and proposed to the plaintiffs that they and the General Electric Company join their forces and resources for the joint development of said Priest Rapids project, both for irrigation and power purposes, and to that end a meeting was proposed by the General Electric Company and that the plaintiffs and said General Electric Company meet in a joint meeting [8] and conference to be held in the City of New York, New York, A.D., 1913, to work out and consider plans for the combination of the resources, plans, surveys and efforts on the part of the plaintiffs and the General Electric Company toward the development and utilization of said Priest Rapids as a joint or common

project by the plaintiffs and the said General Electric Company.

XIV.

During the period prior to the year 1913, while the defendant, General Electric Company, was making its investigations and surveys to determine the possibilities and feasibility of said Priest Rapids on said Columbia River for development as a power site, one Charles A. Coffin, who was one of the original founders of the General Electric Company and originally its president, and in the year 1913 and subsequent thereto was Chairman of the Board of Directors of said corporation, and who acted as spokesman for said corporation in the preliminary negotiations and conferences between these plaintiffs and said General Electric Company leading up to the formation of the joint venture agreement hereinafter alleged, stated and represented to these plaintiffs that the defendant, Electric Bond & Share Company, had been originally organized by the defendant, General Electric Company, and the General Electric Company owned all of the issued and outstanding capital stock, both common and preferred, of the defendant, Electric Bond & Share Company, and that through such original organization and the stock ownership, the defendant, General Electric Company, controlled and directed the corporate business, affairs and activities of the said defendant, Electric Bond & Share Company, through directors and officers trained, loyal to and historically connected with the General Electric Company, and selected, nominated and voted into of-

fice by the General Electric Company through its stock ownership and voting control of the defendant, Electric Bond & Share Company as the ostensible [9] management of said Electric Bond & Share Company, and the defendant, General Electric Company, and the said Charles A. Coffin in its behalf further stated and represented to the plaintiffs that because of the existing harmonious relationship between the two defendant corporations, and the domination and control of the General Electric Company over the Electric Bond & Share Company and the further fact that Electric Bond & Share Company maintained its own engineering, surveying, appraisal and other highly trained and technical staffs, the plaintiffs were requested by the said General Electric Company, and the said Charles A. Coffin in its behalf, in all things to consult, work with and negotiate with one Sidney Z. Mitchell, who was President and managing director and officer of Electric Bond & Share Company, which in turn was under the direction and control of General Electric Company.

XV.

As the direct and proximate result of the consultations and negotiations carried on between the plaintiffs and the General Electric Company, in which the said Sidney Z. Mitchell participated, ~~a~~ an oral contract or agreement, in the nature of and constituting a joint venture was worked out, formulated and agreed upon between the plaintiffs on the one hand and the General Electric Company and its subsidiary and agent, Electric Bond & Share

Company, on the other hand, A.D., 1913, by Charles A. Coffin, Sidney Z. Mitchell and Henry Pierce, under the terms and conditions of which it was agreed between the parties, and each with the other agreed to do and perform the following acts and things and furnish to the other services, information and financial and other assistance as hereinafter set out.

XVI.

In, by and under such joint venture agreement it was stipulated and agreed by the plaintiffs that on their part they would:

(a) Withhold, withdraw from and abandon plaintiffs' plans for the development which they proposed and had under [10] consideration at Priest Rapids and join the defendant, General Electric Company, and its subsidiaries, including the defendant, Electric Bond & Share Company, acting under the direction and control of said General Electric Company, and its agents, in a joint substitute plan for the single full development of the Priest Rapids area for irrigation and power purposes, for the joint benefit of plaintiffs and said General Electric Company;

(b) Aid and assist in securing favorable legislation through the Congress of the United States affecting the proposed power site on the Columbia River, which was a navigable river and under the then existing Federal laws no license or permit to cross or span the same with a dam for power purposes could be obtained for a period exceeding ten

(10) years, and to make the plans of the parties then under consideration, and to justify the vast expenditure of money which would be required to develop such project feasible, a longer period or term for such license or permit was imperative;

(c) Assist in securing additional power and industrial sites and lands which would be turned over to the defendant, General Electric Company, or to its subsidiaries or subholding corporations or agents as directed by it, for the purpose of constructing a dam for the generation of power and for irrigation purposes, upon the passage of favorable Federal legislation;

(d) Make available to the defendant, General Electric Company and its subsidiaries and/or subholding corporations or agents, as directed and requested by it, all of the plaintiffs' records, investigations, field logs, field work and knowledge of the plaintiffs as it related to resources, sources of minerals, building and other materials, as related to the development of power and for irrigation and other purposes;

(e) Jointly acquire with the defendant, General Electric [11] Company, or by or through its subsidiaries and agents as directed by it, fifty-five thousand (55,000) acres controlled by the plaintiffs and which was a part of the plaintiffs' original plan and project, which was railroad grant lands, and the parties would jointly work with and control such lands, and the plaintiffs would devote their efforts

toward the acquisition of or control over other privately owned lands and private landowners, and thereby protect the plaintiffs' original plans for irrigation and the said defendant, General Electric Company's, original plans for power development and industrial expansion;

(f) Employ plaintiffs' resources, connections and efforts to obtain favorable water power legislation in the Congress of the United States which would permit and make feasible the construction of a dam at Priest Rapids, and as a part of such campaign to create a demand locally, and throughout the state and nationally for such legislation.

XVI½.

In and by such joint venture agreement it was stipulated and agreed by and on the part of the defendant, General Electric Company, that it, directly or through its subsidiaries acting under its direction and control and in its behalf, would:

(a) Allot to the plaintiffs and they would receive five hundred thousand dollars ($500,000.00) worth of common stock of a corporation to be known as the Priest Rapids Power Company which the defendant, General Electric Company, itself or acting through agencies directed and controlled by it would cause to be organized and incorporated with an authorized par value corporate stock of forty million dollars ($40,000,000.00) upon the passage of favorable power legislation by the Congress of the

United States affecting the Priest Rapids power site;

(b) Plaintiffs were to be allotted, own and receive a thirty per cent (30%) interest in a land holding syndicate to [12] be formed immediately following the making and entering into of said joint venture agreement, which syndicate was to acquire the approximately fifty-five thousand (55,000) acres of land above referred to as railroad land grant lands, the affairs of said land syndicate to be jointly controlled by the plaintiffs and said General Electric Company, or representatives under its control;

(c) The plaintiffs were to have allotted to them and to receive a ten per cent (10%) stock interest in corporations to be formed to be known as the Terminal Townsite Company, and other companies, for the purpose and with the object of the development of industrial and transportation facilities in the immediate vicinity of and adjacent to said Priest Rapids site, which corporations were to be formed and organized upon and immediately following the passage of favorable Federal legislation affecting said Priest Rapids site, which was then within the contemplation of the parties, and the formation and incorporation of the said Priest Rapids Development Company above referred to;

(d) There was to be allotted to and received by the plaintiffs a ten per cent (10%) interest in any and all of the various syndicates or corporations to be formed or organized for the purpose of acquiring

or developing mineral rights, minerals, building materials and various other resources to be used and useful in connection with the development of said Priest Rapids and said Columbia River for power and irrigation purposes;

(e) The defendant, General Electric Company, itself, or through the defendant, Electric Bond & Share Company, owned, dominated and controlled by it, would furnish all funds and facilities to meet the expense to be incurred, and the moneys to be expended, and the activities to be performed during the preconstruction and construction period, and during the period of work and effort to secure favorable Congressional laws to make feasible and possible the development of said Priest Rapids as a power, industrial [13] and irrigation project, and the said defendant, General Electric Company, further promised and agreed with the plaintiffs that, it or through subsidiaries acting for it under its direction and control would institute and diligently prosecute all necessary activities and perform all acts necessary or required for the fruition and realization of the plans and prospects of the parties for the development of said Priest Rapids site for power and irrigation purposes.

XVII.

In the making and entering into of said joint venture agreement as above set out, it was mutually agreed by and between the parties thereto that each

of the parties would advise with and consult the other in matters of general policy for the carrying out of such plans and developments and that each would consider and respect the suggestions of the others with reference thereto, and that the parties thereto would jointly control the operation of such joint venture.

XVIII.

Thereafter, and following the formation of such joint venture, the plaintiffs on their part made available to the defendant, General Electric Company, and to its representatives and agents, and to the representatives and agents of subsidiaries under the direction and control of said General Electric Company, as directed by said General Electric Company, all of their records, investigations, reports, field logs and findings in connection with their field work, and disclosed to the said defendant and its said representatives, agents and subsidiaries as above set out, including knowledge and information with reference to minerals and mineral deposits, lime deposits, and deposits of a mineral or material known as and called "Tufa," which is a form of natural cement and useful and could be utilized in the construction of the proposed dam and other improvements in connection with such project, including irrigation flumes, and ditches, in connection with the proposed [14] dam and other improvements in connection with the proposed irrigation system, and the plaintiffs generally and in all things done and performed the said joint venture on their part to be performed.

XIX.

In furtherance and as a part of the performance of the said joint venture agreement on their part to be performed, the plaintiffs contacted and caused to be contacted senators and representatives in the Congress of the United States from the State of Washington and other states interested in the development of hydroelectric power, and aided and assisted in furnishing information and in formulating legislation aimed at the passage of favorable legislation in said Congress which would permit the development of said Priest Rapids project for the development of hydroelectric power, and by contact with influential voters interested in the development of said Priest Rapids Highlands project, and kindred projects elsewhere in the United States, and secured their aid in the furtherance of such legislation, all to the end of the passage of such legislation.

XX.

As originally proposed the said legislation contemplated only the development of hydroelectric power on navigable rivers and streams, and licenses and permits therefor to cover a period of fifty (50) years, but at the suggestion and upon the insistence of the defendant, General Electric Company, and its subsidiaries under its direction and control, and against the wishes of the plaintiffs, made an attempt to secure legislation which would cover the development of hydroelectric power not only on navigable rivers and streams, but also on nonnavigable rivers and streams, and would extend the life of the li-

censes or permits to a term of ninety-nine (99) years, which later proposed legislation, because of adverse pressure against the same, was [15] abandoned, and after a delay of some seven years, during which the 63rd Congress and until the 66th Congress convened and had such legislation under consideration, in March, 1920, such favorable water power legislation became law, during all of which time the plaintiffs were devoting their efforts in furtherance thereof.

XXI.

In further performance of said joint venture agreement on their part to be performed, the plaintiffs acquired for the land syndicate formed for such purpose under the joint venture agreement, the fifty-five thousand (55,000) acres of land for irrigation, and other lands, some of which had previously been acquired by the defendant, General Electric Company, acting through a subsidiary controlled by it, and including lands to be included in the corporation Townsite Terminal Company above referred to. The plaintiffs further in the performance of said joint venture agreement on their part to be performed, at the request of and under the direction of the defendant, General Electric Company, and its agents, representatives and subsidiary corporations under its domination, direction and control, secured the above-mentioned Tufa deposits immediately adjacent to the proposed dam and townsite, in the contemplation of the parties, and which deposits it was agreed between the parties were to be turned over to a corporation to be or-

ganized as the Tufa Natural Cement Company, which was within the contemplation of such joint venture agreement.

XXII.

After the passage of legislation favorable to the development of the Priest Rapids project by the Congress of the United States in 1920, the General Electric Company through its agents and representatives, and through its subsidiary, Electric Bond & Share Company, dominated, directed and controlled by the defendant, General Electric Company, and through its complicated [16] and confusing, and in some instances wholly fictitious, corporate setups, caused diamond drilling and other engineering services to be done and performed at the said Priest Rapids site, and in the vicinity thereof, for the purpose of making estimates and determinations as to the probable costs and specification necessary for the construction of such proposed dam and other improvements. Prior to such times the defendant, by and through one of its subsidiaries acting under its domination, direction and control had secured a permit and later a license to construct the proposed dam for the purpose of producing and manufacturing hydroelectric power at said Priest Rapids site.

XXIII.

The said permit for the construction of said dam was granted about the year 1925, and at said time, by public declaration through the press and by private communication to the plaintiffs by and through the defendant, General Electric Company and its

subsidiaries acting under its domination, direction and control, affirmed and reaffirmed its intention to immediately proceed with the proposed project, and these plaintiffs believed and relied upon the statements and assurances so made by and under the direction of the defendant, General Electric, that such project would be pushed to full realization and fruition.

XXIV.

The said defendant, General Electric Company, to the knowledge of these plaintiffs, at no time abandoned the performance of such joint venture agreement on its part, nor did it notify the plaintiffs to that effect, but at all times advised and assured these plaintiffs that it still proposed and intended to proceed with the said proposed plans, but following the securing of such license, about the year 1929, the entire United States was in a depression following World War No. I, and following this the United States entered World War No. II, all of which [17] resulted in Government controls of metals and materials which would be needed and required in the prosecution of such development and project, and as a result thereof the said defendant, General Electric Company, was hampered and delayed in prosecuting and proceeding with the development of said Priest Rapids, but at all times the said General Electric Company advised and assured the plaintiffs that it fully intended to perform its part of said joint venture agreement, which advice and assurances the plaintiffs believed and relied upon.

XXV.

Following the peace of World War II the subsidiary which the defendant, General Electric Company, had previously and publicly stated would build the Priest Rapids dam and furnish electrical power for the syndicated lands, secretly carried on negotiations for disposing of the large land holdings of the said land syndicate for a nominal sum, which sale was later completed without the consent of the plaintiffs, although formal protest against said sale was made by plaintiffs upon learning of the proposed sale, and which action placed the syndicate lands beyond the power of the defendants to perform the terms of such joint venture agreement on its part to be performed. At all times the plaintiffs served written and verbal notice on the defendants of their objections to any disposition of the said syndicate lands, either in whole or in part.

XXVI.

In view of the facts which lead the plaintiffs to believe, just prior to the commencement of this action, that the defendants were starting to change the ownership of the properties in the state of Washington, and contrary to the terms and conditions of said joint venture agreement, and the performance of such acts and things would prevent and interfere with the defendants in performing the terms, conditions and agreements in said [18] joint venture, the plaintiffs, on or about June 14th, 1951, made written demand on the said defendant General Electric Company to complete and comply

with the terms and conditions of said joint venture agreement, or in the alternative to make settlement with and make the plaintiffs whole as the result of their losses, in money, time, effort and in all other respects by reason of the plaintiffs' changed position as the result of said joint venture agreement, and the efforts on their part to perform and fully comply therewith on their part, to which demand the said defendant, nor anyone for it made any response and this action was then instituted promptly.

XXVI.

As the direct and proximate result of the defendants failure to perform and carry out the terms and provisions of said joint adventure agreement, and the necessary changes in position the plaintiffs were required to make and undertake on their part to carry out the said joint venture agreement on their part to be performed, and the time and efforts expended and the moneys paid out by them by the plaintiffs, in all things required of them to carry out their part of said joint venture agreement, the plaintiffs have been injured and damaged, and have materially changed their position to their detriment in the following particulars:

1.	Priest Rapids Power Company common stock	$ 500,000.00
2.	10% interest in Townsite Terminal Company, common stock	250,000.00
3.	10% interest in limestone company, construction supply, chemical works, etc.....	100,000.00

4.	30% interest in Tufa Natural Cement Company, common stock ...	50,000.00
5.	Hydro-chemical operations	90,000.00
6.	Reasonably anticipated profits and returns from the development of materials, electrical furnace, chemicals, industries and wood products	300,000.00
7.	Land—syndicate 50,000 acres (3 rural townsites, completely engineered project, 30% of total profit	900,000.00
8.	Engineering 135,000 acre project-power, irrigation, etc.	250,000.00
9.	Privately owned lands, Highlands	750,000.00
10.	Office, laboratory, ranches, equipment, livestock, homes, automobiles, etc.	160,000.00
11.	Mines, mineral lands, research engineering, professional records, maps, and reports	200,000.00
		$3,550,000.00

and in addition thereto the plaintiffs have suffered further damage as the proximate result of the defendants' breach of the said joint venture agreement, as hereinabove alleged, and the loss of finances, credit and engineering and business opportunities, loss of business and professional records and prestige, and the utilization of the plaintiffs' knowledge, experience and training, and loss of opportunities by the plaintiffs. the plaintiffs have been injured and damaged in a sum of not less

than five million dollars ($5,000,000.00), or a total of $8,550,000.00.

For a Second Cause of Action, Plaintiffs Complain and Allege as Follows:

I.

Repeat, reiterate and reallege all of the allegations, matters and things set forth in the foregoing First Cause of Action as fully and with the same effect as though set forth herein and hereat.

II.

The defendants used and employed the knowledge, experience and efforts of the plaintiffs during the period covered by said co-adventure, and as a result thereof obtained favorable legislation, as hereinabove set out and other advantageous positions and situations, and as a result thereof the defendants have secured and obtained enormous profits through the [20] expansion of their facilities, and the defendants did and have made use of, for their own benefits, the various accomplishments of the plaintiffs, in procuring for the defendants great and immense profits and expansion of their various enterprises, which cannot now be determined by these plaintiffs.

For a Third and Further Cause of Action Against the Defendants, the Plaintiffs Complain and Allege as Follows:

I.

The named defendant corporation, Electric Bond & Share Company, because of its participation, ac-

tivities and financial investments and support in connection with the limited performance of the said Joint Venture agreement on the part of the defendant General Electric Company, all as hereinabove set forth is a proper party defendant to this action, and, in the event it shall determine or desire to appear herein and assert or have determined any alleged rights, claims or remedies it may have or claim against the plaintiffs or its co-defendants, such rights, claims or remedies may be asserted or determined in this action, but in the event it shall elect or determine not to appear herein or assert or have determined any such claimed rights or remedies, the final determination of the matters in controversy as between these plaintiffs and the said General Electric Company can be had herein without injuriously affecting the interests of the defendant corporation, Electric Bond & Share Company, and without leaving the controversy involved herein in such situation that its final determination as between the plaintiffs and the defendant General Electric Company may be inconsistent with equity and good conscience.

Wherefore the plaintiffs pray:

1. That the court find and determine that the parties hereto made and entered into a joint venture agreement as herein set forth; [21]

2. Finding and determining that the defendants, and in particular the defendant General Electric

Company has wholly failed, neglected and refused to complete, carry out and perform the terms and conditions of said joint venture agreement, and by its acts and actions has put it beyond its power to so perform said joint venture agreement;

3. That because of the failure, neglect and refusal of the said defendants, and particularly the defendant General Electric Company to complete and comply with the terms, conditions and agreements contained in said joint venture agreement, the plaintiffs have materially changed their position, financially and otherwise, and have been injured and damaged thereby in the sum of not less than Eight Million Five Hundred Fifty Thousand and no/100 ($8,550,000.00) Dollars which sum the plaintiffs are entitled to recover from the defendants, jointly or severally;

4. That the Court make such other or further order, judgment or decree as shall be mete and just in the premises, including judgment for the costs and disbursements of this action.

PHIPPS & PHIPPS,

By /s/ HARVE H. PHIPPS,
Attorneys for Plaintiffs.

[Endorsed]: Filed November 5, 1953. [22]

[Title of District Court and Cause.]

ORDER QUASHING SERVICE AND DISMISSING ACTION

The defendant Electric Bond & Share Company's motion to dismiss the action or to quash the return of service of summons having been noticed for hearing and heard on the 17th day of November, 1952, plaintiffs appearing by R. Max Etter and Harve H. Phipps and defendant appearing by Paine, Lowe & Coffin, their respective attorneys, the Court being advised in the premises, now

Orders that the motion to quash the return of service be granted and that the plaintiffs' action against the defendant Electric Bond & Share Company be dismissed without prejudice.

Dated this 21st day of November, 1952.

Enter:

/s/ SAM M. DRIVER,
Judge.

Presented by:

/s/ WM. S. PAINE.

O.K. as to Form:

/s/ R. MAX ETTER.

[Endorsed]: Filed November 21, 1952. [23]

[Title of District Court and Cause.]

ORDER QUASHING SERVICE AND DISMISSING ACTION

The defendant American Power & Light Company's motion to dismiss the action or to quash the return of service of summons having been noticed for hearing and heard on the 16th day of January, 1953, plaintiffs appearing by R. Max Etter and Harve H. Phipps, and defendant American Power & Light Company appearing by Paine, Lowe & Coffin, their respective attorneys, the Court being advised in the premises, now

Orders that the motion to quash the return of service be granted and that the plaintiffs' action against the defendant American Power & Light Company be dismissed without prejudice.

Dated this 9th day of April, 1953.

Enter:

/s/ SAM M. DRIVER,
Judge.

Presented by:

/s/ WM. S. PAINE.

O.K. as to Form:

/s/ R. MAX ETTER.

[Endorsed]: Filed April 9, 1953. [24]

[Title of District Court and Cause.]

MOTION TO MAKE SECOND AMENDED COMPLAINT MORE DEFINITE AND CERTAIN

Plaintiff's second amended complaint is so vague and ambiguous as to defendant General Electric Company, that said defendant should not reasonably be required to prepare a responsive pleading, and said defendant therefore moves that plaintiffs be ordered to furnish a more definite statement of the nature of their claims as set forth in their complaint in the following respects:

I.

Paragraph IX, line 9, page 7 by stating in what manner the partnership brought under its control approximately 135,000 acres of land and whether or not the same was oral or written, and if in writing to set forth a copy thereof.

II.

Paragraph XII, line 8, page 8, by stating in what manner the plans of Plaintiffs were in conflict with the project and in conflict with the plans of the General Electric Company.

III.

Paragraph XIII, line 26, page 8, by stating what officials and agents of the General Electric Company contacted the Plaintiffs and by stating the date it was proposed to the Plaintiffs that they and the

General Electric Company join their forces and resources for the development of the Priest Rapids project, and whether or not said proposal was oral or in writing, and if in writing to set forth a copy thereof. [25]

IV.

Paragraph XIV, line 19, page 9, by stating the date of the alleged representations, whether the same were oral or in writing and if in writing to set forth a copy thereof.

V.

Paragraph XIV, line 3, page 10, by stating whether the alleged representations to the plaintiffs were oral or in writing, and if in writing to set forth a copy thereof.

VI.

Paragraph XIV, line 17, page 9, by specifying the dates and places of the alleged conferences and the names of the parties present.

VII.

Paragraph XIV, line 9, page 10, by stating whether the request by the said General Electric Company referred to was oral or in writing, the date thereof, and if in writing to set forth a copy thereof.

VIII.

Paragraph XV, line 20, by stating the date of the alleged joint venture agreement and by stating whether or not the agreement was oral or in writing and if in writing to set forth a copy thereof and by further stating what officer or agent entered into

said contract for and on behalf of the General Electric Company.

IX.

Paragraph XVI, line 24, page 12, by stating whether the Priest Rapids Power Company was incorporated.

X.

Paragraph XVI, line 31, page 12, by stating whether the land syndicate was formed, and if so, the name thereof, the names of the members comprising the same; by stating whether or not the plaintiffs received a 30% interest therein. [26]

XI.

Paragraph XVI, line 9, page 13, by stating whether the Terminal Townsite Company was organized.

XII.

Paragraph XVII, line 10, by stating whether the mutual agreement referred to was oral or in writing and if in writing to set forth a copy thereof.

XIII.

Paragraph XVIII, line 20, page 14, by stating the name of the representatives and agents of the General Electric Company and also the names of the representatives and agents of the subsidiary under the direction and control of the said General Electric Company, to whom the plaintiffs made available all of their records, investigations and reports and the dates and places where said records

were made available, and also the name of the subsidiary referred to.

XIV.

Paragraph XX, line 24, by stating whether the suggestion of the defendant General Electric Company was oral or in writing, and if in writing to set forth a copy thereof and by naming the subsidiaries alleged to be under its direction and control.

XV.

Paragraph XXI, line 9, page 16, by setting forth the name of the land syndicate referred to, the members thereof and when organized.

XVI.

Paragraph XXI, line 12, page 16, by naming the subsidiary alleged to be controlled by the General Electric Company and by stating the manner in which said subsidiary was controlled by the General Electric Company.

XVII.

Paragraph XXI, line 18, by stating the names of the agents and representatives of the General Electric Company referred to and the names of the subsidiary corporations alleged to be under the domination, direction and control of the General Electric Company. [27]

XVIII.

Paragraph XXI, line 20, by stating when the plaintiff secured the Tufa deposits referred to, the name of the individual or company acquiring title

to the same, and the name of the officer or agent of the defendant General Electric Company who requested the plaintiffs to secure said deposits.

XIX.

Paragraph XXII, line 2, page 17, by stating who caused the diamond drilling and other engineering services to be performed at the Priest River site.

XX.

Paragraph XXII, line 9, page 17, by stating the dates of the permit and license and in whose name the same were issued.

XXI.

Paragraph XXIV, line 28, by stating what officers or representatives of the General Electric Company advised and assured the plaintiffs that they proposed to proceed with the proposed plans and whether such advice and assurance was oral or in writing, the date thereof, and if in writing to set forth a copy thereof, and that the same showing be made with respect to the alleged assurance given to the plaintiffs as alleged in line 6 in the same paragraph on page 18.

XXII.

Paragraph XXV, line 11, by stating the name of the subsidiary which the defendant General Electric Company had publicly stated would build the Priest Rapids Dam, and by stating where and when the General Electric Company made such announcement, and the form thereof.

XXIII.

Paragraph XXV, line 17, by setting forth the date of the alleged sale and also the date of the protest made against the sale by plaintiffs and whether oral or in writing and if in writing to set forth a copy thereof and by setting forth the written notice referred to in line 23 of said [28] paragraph.

XXIV.

Paragraph XXVI, line 12, page 20, by separately setting forth the nature and amount of finances, credit, engineering and business opportunities, business and professional records and prestige alleged to have been lost by the plaintiffs.

XXV.

Paragraph II, of the second cause of action, line 32, page 20, by stating the amount of profit alleged to have been secured and obtained by the defendant, and line 2, page 21, by setting forth the various accomplishments of the plaintiff which the defendants used for its own benefit.

/s/ PHILIP S. BROOKE,

HAMBLEN GILBERT & BROOKE,

Attorneys for Defendant General Electric Company.

Service of Copy acknowledged.

[Endorsed]: Filed August 25, 1955. [29]

[Title of District Court and Cause.]

MOTION TO STRIKE

Comes now General Electric Company, defendant above named by its attorneys, and moves the court for an order striking the following portions of the Second Amended Complaint on file herein, upon the ground that the same are irrelevant, redundant and immaterial:

I.

Paragraph V and the whole thereof. In the event said motion is denied as to the entire paragraph, defendant moves that all that part of said paragraph commencing with line 29, page 3, to the end of the paragraph be stricken.

II.

Subparagraphs 1 to 11, inclusive, of paragraph XXVI and lines 10 to 18, inclusive, of paragraph XXVI on page 20.

III.

Paragraph II of plaintiffs' Second Cause of action, and each and every part thereof.

IV.

Paragraph I of plaintiffs' Third Cause of action, and each and every part thereof.

This motion is based upon the files and records herein.

/s/ PHILIP S. BROOKE,

HAMBLEN GILBERT & BROOKE,

Attorneys for Defendant General Electric Company.

Service of Copy acknowledged.

[Endorsed]: Filed August 25, 1955. [30]

[Title of District Court and Cause.]

MOTION TO DISMISS

Defendant General Electric Company moves the Court as follows, with reference to Plaintiffs' Second Amended Complaint herein:

I.

To dismiss the above-entitled claim as to the General Electric Company for the reason that said Second Amended Complaint fails to state a claim against said Defendant upon which relief can be granted.

/s/ PHILIP S. BROOKE,

HAMBLEN GILBERT & BROOKE,

Attorneys for Defendant General Electric Company.

Service of Copy acknowledged.

[Endorsed]: Filed August 25, 1955. [31]

[Title of District Court and Cause.]

(Copy)

AFFIDAVIT

State of California,
County of Placer—ss.

I, Milton E. Dam, being first duly sworn, depose and say that he is one of the Plaintiffs;

That he has directly carried on the activities pertaining to this action;

That it is appreciated that this petition and appeal may not be in strict accordance with the usual Court procedure covering such steps, but it is believed that the Court will understand in view of the circumstances pertaining to this Case since the filing, together with the following facts;

That it is desired to meet only the present matter of Notice issued by your Court under date of August 11, 1955, presenting the conditions upon which this appeal and request is made and under which true circumstances it is believed consideration by your Court is justified;

That the undersigned, due to circumstances, occupies the position of having carried on almost alone the enormous work and activities covering this gigantic affair, particularly since filing the action;

That because of the strain and unnatural nervousness to the extreme with the added burden during

this last period, had a case of fighting a complete nervous breakdown, and was forced not long ago to come south in an endeavor to recover a more normal condition; [32]

That there has not been and is not now any element of purposely delaying or prolonging this action in question;

That there are certain conditions and phases pertaining to the carrying on and confident assurance of a satisfactory completion and adjustment of this substantial affair, which of course the Court has probably no knowledge;

That there is no desire to burden the Court with any excess explanations, only true and factual reasons for the matter of elapse time element;

That it is not unreasonable to understand and believe that with the Plaintiffs in the 70th Year Bracket, with the loss of their former associates and close business acquaintances, that Plaintiffs would not purposely prolong this matter;

That Plaintiffs are not living for the future but for the very present, time is very dear and precious to them;

That thousands of dollars of expenditures and a long time was devoted in preparing the material for this matter, that a more complete and hundreds of documents and exhibits making up the continuous

and connecting material was never equaled in the history of our State in legal records;

That the undersigned had charge of this tremendous work and task, and it is now evident that he tried to hold on and put off too long to make the beneficial move to recover;

That by the same Heavenly Power Above that has made it possible for Plaintiffs to endure and survive the long period of suffering and ruinous losses, will give us strength to carry this matter on, with full confidence for the rightful outcome;

That the Opposition has been in harmony, to undersigned last knowledge, with the unintentional lapse of time in this matter, that they are the gainer with the Plaintiffs the loser with this unfortunate lost time element;

That this matter represents the entire life and work and endeavor of the Plaintiffs, that it would be disastrous for any drastic action to change the present legal status of same;

That because of the above circumstances and undersigned being far away from Counsel and unable to personally confer, this appeal is being written and forwarded unaided to your Honor and Plaintiffs pray that same will be carefully considered and accepted as the true facts and statements covering the matter.

/s/ MILTON E. DAM.

Subscribed and sworn to before me this 30th day of August, 1955.

[Seal] /s/ MARY ELIZABETH MONCHAMP,
Notary Public for California.

My Commission expires February 25, 1958.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 2, 1955. [33]

United States District Court, Eastern District of Washington, Northern Division

Civil No. 1036

MILTON E. DAM, et al.,

Plaintiffs,

vs.

GENERAL ELECTRIC COMPANY, a Corporation,

Defendant.

RECORD OF PROCEEDINGS AT HEARING ON MOTIONS

Be It Remembered that the above-entitled cause came on for hearing at Spokane, Washington, on Wednesday, September 7, 1955, before the Honorable Sam M. Driver, Judge of the above-entitled Court, the plaintiffs being represented by Harve H. Phipps, of Spokane, Washington, the defendant being represented by Phil S. Brooke, of Spokane,

Washington; Whereupon, the following proceedings were had, to wit:

The Court: I will take up the motions in the Dam case first, then. [65*]

Mr. Brooke: May it please the Court, your Honor may recall that heretofore on behalf of the General Electric Company, we briefly argued the motion to dismiss on the grounds that there are indispensable parties not before the court, also the question of the statute of frauds, and also the question of laches, which your Honor held that matter in abeyance pending his ruling on the motion to dismiss the Electric Bond and Share Company, which was subsequently granted and they are out of the case.

Your Honor may recall that this action originally started out claiming a joint adventure agreement between the Dam brothers and General Electric, the American Power and Light, and the Electric Bond and Share. They were unable to get service on the American Power and Light, so they dropped out of the picture; the Electric Bond and Share Company has been dismissed from the action; but, nevertheless, the complaint still alleges a joint adventure agreement was worked out formally and agreed upon between the plaintiffs on the one hand and the General Electric Company and its subsidiary and agent, Electric Bond and Share Company, on the other hand, under the terms and conditions of which it was agreed between the parties that each with

***Page numbering appearing at the foot of the original certified Supplemental Transcript of Record.**

the other agreed to do and perform the following acts and things. This alleged joint adventure agreement was entered into in 1913. [66]

Now, then, we have presented herewith our authorities, and I am not going to refer to them because I presume the Court will wish to examine the briefs. Counsel for the plaintiffs have also submitted a brief. But we have a brief which presents the proposition that a joint adventure is nothing more or less than a partnership, except for a specific purpose, and there are some respectable authorities cited here to the effect that in an action of this kind, which is in the nature of an accounting, it is necessary that all parties to the joint adventure agreement be before the court. Otherwise, complete accounting cannot be completed as to all of the parties. And we have cited any number of authorities on that position.

So our first point is that there are indispensable parties, namely, the Electric Bond and Share and also the American Power and Light, which are not before this Court.

Jurisdiction could be had of all of these defendants in the jurisdiction of New York, so the plaintiff is not without a remedy.

Now, the second point is that it appears from the face of the complaint that a contract was entered into which is void under the statute of frauds, in that it could not possibly be performed within a period of one year. The complaint alleges that the agreement was entered into in 1913; that it would be necessary to secure federal [67] legislation to

build these dams. The legislation was finally enacted in 1920, a permit was issued in 1925, and then nothing was done. As a part of the project, they were to irrigate over 155,000 acres, just inconceivable, and besides build this dam, the Priest Rapids.

Now, it is just inconceivable to me that a project of this magnitude could be completed within one year, and the courts have held and the authorities I have cited here that the court may take into consideration all of the circumstances and the intention of the parties as disclosed from the alleged contract as to whether or not the contract was to be completed within one year. So this seems to me inconceivable that the parties ever intended that this contract should be performed within one year and, therefore, it is in contravention of the statute of frauds.

Point 3 is that the plaintiffs are guilty of laches. As I say, it has been nearly 40 years since this alleged agreement was entered into. It has been practically 30 years since the permit for the dam was issued and nothing has been done, and these parties have sat idly by and haven't enforced any of their rights in the matter, if they have any.

Now, then, there is a very excellent Washington case where the parties sat by, and, mind you, there is no allegation here of fraud or anything of that kind; it is [68] just failure to carry out an alleged agreement; and there is a very excellent Washington case where the parties sat by for a much less period than this——

The Court: I think that is cited in your brief, Mr. Brooke.

Mr. Brooke: Yes, Teeter v. Brown, 130 Washington, 506, which is a leading case, and briefly reading from that:

"Where a case is of purely equitable cognizance, in the application of the doctrine of laches, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, ancient demands, and refuse to interfere where there has been gross laches in prosecuting the claim or long acquiesence in the assertion of adverse rights. In such cases the statute of limitations does not necessarily govern the court in the application of the doctrine of laches. Regard must be had to all of the facts and surrounding circumstances, and if, when carefully considered, they do not appeal to the conscience of the chancellor, on behalf of a claimant, the defense of laches should [69] be allowed."

Now, just consider the position that the defendant is in in this case. All of the men referred to—they refer to Stanley Coffin in there as representing the General Electric, refer to a man by the name of Mitchell representing the Electric Bond and Share—those men have been dead for many years. There are absolutely no records on this thing whatsoever that we have been able to find. Of course, that is a matter of proof and probably outside the record, but you can easily conceive when time has been permitted to lapse like it has in this case that we have been greatly prejudiced by this action.

Now, ordinarily, the doctrine of laches is similar

to estoppel and it must be shown that a person relying upon it has been prejudiced, but I think it is self-evident that we have been greatly prejudiced by the fact that these men have taken no affirmative action for all of these years.

Now, then, counsel just served a brief on me this morning and I haven't, of course, had time to answer it, and he raises this question, that under the procedure in the Federal court, the question of statute of frauds or the doctrine of laches cannot be raised on the motion to dismiss, it must be pleaded affirmatively. But in my hasty examination of Barron and Holtzoff, Volume I, Section 281, [70] they say it may be raised where it appears on the face of the complaint, and there is also a case in 174 Federal (2d), 1003, in which it is held that if the defect is apparent from the face of the complaint, the doctrine of laches, statute of limitations, and so on, may be raised by motion.

The Court: Let's see, what was that page number? 104 Federal (2d), page what?

Mr. Brooke: 174 Federal (2d), 1003, Seventh Circuit.

The Court: Yes, all right.

Mr. Brooke: And then Barron and Holtzoff, and then I find any number of Washington cases which support the proposition that if the complaint on its face shows the plaintiff is guilty of laches, that a demurrer is the proper method of attack, and that principle should apply, I think, to the motion of dismissal. It is substantially the same as a demur-

rer, I believe, and there are a couple of Washington cases on that. In 75 Washington, 212:

"If the pleader sets out a contract that is within the statute of frauds, the defendant may properly demur or he may answer setting up the bar of the statute."

And then also in 30 Washington, 622, and 15 Washington, 57:

"Subject of demurrer if the complaint on the face shows plaintiff guilty of laches."

As I say, this matter on the first point about the [71] indispensable parties has been argued a couple of times to your Honor, and I am not going to take any longer time. There are extensive briefs on file covering both situations.

But I think for three reasons the motion should be granted; namely, there are indispensable parties who are not before the court; two, the contract violates, is void, under the statute of frauds, because it was inconceivable that this contract could be performed within one year; and the third point, that the plaintiffs are guilty of laches in letting all this time go by to the great prejudice of the defendant.

Mr. Phipps: If your Honor please, I think this is one of the most important cases that ever came before this Court, and never a case just like it.

In the complaint we allege that the joint venture deal was made with the General Electric after a lot of negotiating and after the Dam brothers had laid the foundation for a great development down there on the Columbia River, and there are certain

things that the Dam brothers were to do, commencing as young men, raised down there and their father, I believe, lived there, and they had built up this place to the point where they had control, virtually, of Priest Rapids. The General Electric just across the river had a large body of land and certain rights. The [72] Strahorn interests had certain rights up above them on the other side of the river, also. But all of the irrigable land and all of the advantages to get to the river and get to the site were controlled by the Dam brothers. They had put in their lifetimes there working this up to the point where they could develop the community there, and then according to the complaint here, the General Electric, who had already been negotiating a long time and who had obtained control of a large body of land there, we claim that they came along and said: "Now, here, we want you folks to come in with us because we are interested in power. We are not so much interested in all of the other things, of building a smokeless city, and so on, but we are interested in that, also, but essentially power."

But at that particular time, the Army Engineers had control of the navigable streams, on account of the fact that the power companies had been rather greedy, I presume, and the Army Engineers had been authorized to and they had made a rule that they would not grant a permit for power purposes for more than ten years. Naturally, ten years was a very short period of time on which financing could be done.

So the General Electric people, who had already

been there, who controlled everything all these years, once in a while through a little subsidiary, like a fingernail on the little finger, holding title and things of that kind [73] after they found out that the Dam brothers were in control of Priest Rapids and all of the high land there, consisting of about 150,000 acres in that cove surrounded by the Rattlesnake Hills on the west, running north and south, the Rattlesnake Hills running north and south, then the Umptanum Hill connecting as an elbow around to the gap which cut through, where the river cut through the Saddle Mountains there, and then the Saddle Mountains for 30 Miles east and then at the east end of the 30 mile distance a curve there back south, making a cove in there, one of the finest places in the world to develop a venture of this kind, so they virtually laid down on the Dam brothers to obtain this legislation and Senator Wesley L. Jones fathered the legislation through the Congress of the United States. Nobody would ever question Wesley L. Jones on anything, if he knew what he was doing.

All right, it took the General Electric, with all the forces of a thousand land owners down there, the association or the organization controlled—developed and controlled by the Dam brothers over a period of a long time—it took all of that land owners association and all of the forces of the Dam brothers and the force of Senator Jones to get that legislation through, and that took seven years.

The General Electric wanted 99 years, and there is the only disagreement that has ever come up between the Dam brothers and the General Electric

during that time. The [74] Dam brothers thought they should accede to the 50 year period and go ahead with the project. So they stalled along for seven years and finally the bill was passed, and the pen with which the bill was signed by the President of the United States was presented to Milton Dam, and that ought to be sufficient to show the great importance of this Dam organization, the Priest Rapids Highlands organization, and the farmers' organization there in getting this legislation through.

Now, immediately on the passage of that legislation, the General Electric began to do some diamond drilling down on this project, but they scattered their energies over the United States in about 265 different places, and because of the fact that they could get easier picking in all of the smaller places where they would have absolute control themselves, they neglected this place, and your Honor has read many, many, many times in the general public news where the General Electric is going to do this at Priest Rapids and General Electric and General Electric, and so on.

The W. I. & D. are the little holding company down there that has never had a dollar in this project. It has been just a hand or rather a finger of the General Electric. There has never been anything said about that. There was never anything said by the Electric Bond and Share, who was the company that was wholly owned by the General [75] Electric, every single share. They wanted some means of contacting the public and the General

organized the Electric Bond and Share and did all there was to it and trained their men in the General Electric and set them over the Electric Bond and Share and owned every single share of stock in that company until the S.E.C. told them to distribute that stuff to the stockholders of the General Electric.

Now, then, I think it makes but little difference whether the General Electric owned the Electric Bond and Share by a stock ownership or whether their stockholders owned the interest in the Bond and Share, so the laches here is 100 per cent on the part of the G.E. Here are two men that have lived and worked and entertained these men on their place out there at Priest Rapids. Their pictures are there. They have come out from the Electric Bond and Share, the General Electric, and those companies there that were interested in this great project and surveyed the possibilities there and planned the building of three towns and a smokeless city and bringing in the Milwaukee and the telephones and everything of that kind.

Now, that was a wonderful place over in there that was hidden. It was the Garden of Eden that was hidden from the world, and these Dam brothers went in there over Saddle Mountains, it is just a sheep trail virtually, and [76] they hauled these people over in there and worked on these plans and did everything in the world that they were to do. They have surveyed every foot of that ground for 30 miles. They have got the brass tops and signs and the iron posts for every 40-acre tract and every

160-acre tract for 30 miles long, costing hundreds of thousands of dollars and taking years of time and spending their lives.

Now Mr. Dam and the Dam boys are in the matured end of their lives and they are in physical condition which means virtual exhaustion in working out this project here, and these people should be required to come in here and say, "Now we did what we agreed to do" or admit that they didn't do it, or they should say to us that the Dam boys didn't do what they agreed to do.

We have set out in our complaint here the general setup of the General Electric there, which is, I will say, the golden pot that was back of this whole scheme, because they wanted to sell their products and they had to have these channels through which they could work, and the S.E.C. has found that these little trickling down 265 projects from the South and the East and the West and everywhere were just instrumentalities ultimately reaching back to the General Electric Company, and they had obtained control of 95 per cent of the business of this country through that method.

Now, all we are asking the General Electric to do [77] is to come along here and account to us, and I don't need to make any account, but to pay us the damages we have sustained because of spending our lives down there and now getting to the end of life with nothing in hand and the General Electric taking advantage of that, and under especially one clause of the contract here in regard to

profits that they should not have made, that they have unfairly made, and these facts alone ought to be sufficient to pronounce this a joint venture agreement in which these people should respond, and that is that when they started, when this bill was passed by Senator Jones—I have his picture where he is speaking and leading the fight for this bill for the farmers, for irrigation principally, because your Honor understands the law in regard to the first call upon the waters of this country for agricultural purposes—and this company laid down and utilized their subsidiaries and depended on the Dam brothers and their farmers' organization, and the papers have been full of it, and Jones made those speeches before the Congress of the United States that it was for agricultural purposes first of all, but the G.E. was interested in power and they took on these extra things, not particularly because they wanted to, but because it served their purpose in getting control of about 60 per cent of the advantages at Priest Rapids.

Now, these men have done. I have set out in [78] this complaint here what the Dam brothers were to do. I would like for them to come along now and show us what we haven't done. We set out also, if your Honor please, what the General Electric were to do. I would like to let them come in now and say we did this or we didn't do that.

The very same grasshoppers, if your Honor please, are sitting on the bushes up on that hill now. You can't tell any difference in the territory there at all. They did do a lot of diamond drilling, but they

got all their money back, no doubt, from deductions in their income taxes and things of that kind, and a large sum, I understand, was deducted on account of the Priest Rapids.

Now, the Priest Rapids have not been helped by anything that they have done. The same rocks are there that fell out of that gap and they are scattered, laying solid. I hope your Honor has been down there and seen it. I have. But for two miles to three miles down the river that 1,500 feet of a gap or a gate has broken out and broken to pieces and scattered down for several miles along the river. No doubt when that gap was in there, that Quincy Valley was under a lake, under water. Have to be, 1,500 feet up there, the Saddle Mountains, and then you go right off 30 miles to the east there and it surrounds the very land, 150,000 acres, one of the most beautiful spots in this world.

Now, then, if they had gone ahead and just drilled [79] in there or cut in a little canal over to the edge of that mountain and then pumped that water about 150 feet, just from the level of the river, the natural flow coming in under these state laws that permitted the Dam brothers to do what they were planning on doing, and pump it up there just a little ways to the level of that great flat there and then a canal along the south line of the Saddle Mountains, they figured about $80 an acre to irrigate.

Now, if your Honor please, the present system is coming 160 miles, and they are putting a hole

through the Saddle Mountains in order to legally bring that 150,000 acres into the great scheme of the Coulee Dam irrigation system.

I was in the Legislature and I met these Dam brothers a way back there and I got the first bill through for the survey, Qunicy Valley Survey, it is in the library, and I have watched that all these years and this should never have been a part of it, it should have been developed according to what the Dam brothers advised in the first place and like the General Electric planned in the first place, and that 150,000 acres as an independent project there could have been irrigated for one-fifth what it is costing to irrigate by running a canal 160 miles and then putting a tunnel through Saddle Mountains.

Now, then, all we want these people to do is to [80] come in and answer and show us, show the Court, that they have done anything except very superficial work there in doing some diamond drilling and the camouflaging the ownership there, and whenever the General Electric would come out and talk about it, the papers would say General Electric is going to do this and General Electric is going to do that.

Now, then, these instruments here, they have set out, the Electric Bond and Share, to tap the public of their money and they sure did it and they have paid the public their little 6 per cent and they have increased their assets now around, we'll say, I am not sure of this, but around twenty-five million, at the time that bill was passed, in about 20 years time they had increased their holdings in these 265 companies up to three billion dollars. No telling where

they are now. But three billion dollars on top of a few million dollars that they had in the first place.

Now, then, there isn't a question in this world, and anybody that will read the record and study it will have to find and go down and see the country there, will have to find that, and they won't even deny it, that this bill was put through on the reputation and on the standing of this landowners' organization which was represented by Dam brothers, and if it hadn't been so, if Dam hadn't been recognized as the leader in getting that legislation through for them, the President of the United States wouldn't have given him the [81] pen with which he signed the bill.

Now, that is one thing. The other key thing is that they have profited by the Dam brothers' work there, based on this assumed development of the country there for agricultural purposes, first of all. It was not first in the mind of the General Electric, but they made the Dam brothers feel that they could come in there and put in the power and then sell the power at a special contract to the Dam brothers with which a modern city, in other words, a smokeless city, could be built and that country developed there to unending values. The amount that is demanded in this complaint here, it is specified that is just underestimating what could be imagined, because a 2 per cent commission on the profits that the General Electric has made, based on the development that come after this bill was passed, would amount to more than we have asked for, and we would like for them to answer.

There isn't a question. If this isn't a joint venture deal here, then it just seems to me that we ought to quit discussing joint ventures and say that there is nothing of the kind. Where is there a single act of any of these companies, General Electric included, Electric Bond included, American Power and Light included, W. I. & D. included, where is there one single thing that they have done that would indicate that it is a partnership? If they [82] were to get this thrown into the idea of a partnership business here, then these accountings come in here and the endless litigation and the endless questions that they can raise would keep the Court busy for a long time and probably keep us busy until we would go over the hill.

I think that the proper thing to do is for them to come in here and answer this, or this is one thing, and I am not holding anybody else responsible, this is wholly from myself. I feel and I have felt, and that is one reason, if your Honor please, that this case has been drifting a little bit, just two reasons why it has been drifting: One was a very, very severe nervous breakdown on the part of Mr. Dam, and I couldn't even get in touch with him for a long time and his mail stayed in the mailbox here so long that I became uneasy about the situation and I went to the F.B.I. to help me find Mr. Dam. Now, then, Mr. Dam is recovering from his illness and he will be here ready for trial. But, if your Honor please, this is what ought to be done. There is a chance that it might be done, and I am certainly not suggesting that anybody else has waved any encouraging flags in my face. I don't want it to

appear that way, but I think this: That if the case remains status quo and the Court would be good enough to peruse these briefs on both sides, all of them, all of the briefs from every possible angle, that the Court will find that it is [83] one of the cleanest cut joint venture agreements that has ever been presented to this Court. The Court can find, and clearly so, that the Dam brothers have done everything that they have agreed to do, even their surveys of every acre of that land, with books as long as this desk almost, costs of hundreds of thousands of dollars, and they have done that and they have done it at a risk of all in this world that they had, and Mr. Dam was called back by the General Electric in connection with this bill there and kept in Washington a large portion of the time during more than seven years.

We have all the proof in the world that they laid down on the Dam Brothers and on the association here to get their bill through. Then when they got the bill through, they were so interested in this little spot and that little spot, 265 altogether, and in the S.E.C. Volume XI, you will find that the S.E.C. made up a little picture that is very clear in my mind where they put the ultimate control back here at the Electric Bond & Share, which was owned by the G.E., and got a little line representing all of the 265 or all of the instrumentalities it has used in working out this great scheme of profit, and I think that with what we have said in our briefs, if your Honor please, and what jumbled remarks that I have made here that the Court, if it can have the

time to study these briefs and study the law and study the amended complaint, that it is [84] one of the cleanest cut, clear, not only coming into that category where the Court will say, "Well, the doubt should be resolved in favor of the plaintiff," but it would be so clear that there just can't, it seems to me, be any misunderstanding about it being one of the cleanest and clear-cut joint ventures that has ever been presented to this Court.

And even the agricultural end of it was so thoroughly discussed and is a part of this, and the General Electric sent their man to Europe for the process of making fertilizer and sent for tons of dirt here and did a lot of work in connection with that, and went to the extent, if your Honor please, of paying the German company, Furbenk, some company like that, a half a million dollars for the right to use this in this particular project over there.

Now, then, they ought to be willing to make the Dam Brothers secure the balance of their lives, anyway, in doing just the common sense justice thing, and I believe, I have hopes——

The Court: I think I may as well recess here, Mr. Phipps. I am past my usual recess time. We usually recess at 11:00. I will take a ten-minute recess. This seems to be going on quite awhile.

Mr. Phipps: If your Honor pleases, I am just through and that would be better for your Honor. Just a word more. [85]

The very fact that they have gone ahead on the many things there, like the chemical processes and

things of that kind, and done some of the things, but they have done nothing for the Dam Brothers, and I was just going to conclude by saying, if your Honor please, that if your Honor would peruse these, I can't expect the Court to be Solomon and know everything, I am just assuming that it is necessary to read briefs and things of that kind in order to reach correct conclusions, and if that could be done and the case remain status quo until probably in the next term, that we might avoid the necessity of a long trial in this court if the Court was to sustain our complaint.

The Court: I think there has been some going outside the issues here on both sides. I have these motions now. I do intend to go into it and look at the briefs. However, if you have anything to say in response——

Mr. Brooke: I appreciate this is past the recess hour, but the Court is familiar with XI Securities and Exchange Commission Reports, page 1163—I believe you referred to them in your memorandum here—and in that it was held that the General Electric disposed of all of its investments in the Electric Bond and Share in 1925. And then your Honor has cited other cases here in your brief, 141 Federal (2d), 606, dissolving the American Power & Light, and refers to Electric Bond and Share and all of this setup, [86] and it is significant to me that the General Electric is not mentioned in any of those proceedings whatsoever, so that it is apparent that they have had nothing to do with this company since 1925.

And I think Mr. Phipps in his own argument stated that General Electric Company "neglected." They not only neglected, but they abandoned this thing years ago.

Now, then, we have a motion to make more definite and certain in about 25 different respects. This is a 40-page complaint, but I wonder if we could just let that pass over until you have studied on this matter?

The Court: If you wish to submit it, I will examine it in connection with the pleadings, because I will have to go pretty thoroughly into the file again. It has been a long time since I looked at that.

Mr. Phipps: That '25 date—just one word, your Honor—that '25 date when the General Electric absorbed the Electric Bond & Share, it just took it out of the heart of the General Electric and put it back in the veins. The General Electric, through its stockholders, controls it exactly the same as they did when they had the heart.

The Court: Court will recess now for ten [87] minutes.

Reporter's Certificate

United States of America,
Eastern District of Washington—ss.

I, Donald B. Oden, do hereby certify: That at all times herein mentioned I was the duly appointed, qualified and acting official court reporter of the United States District Court for the Eastern District of Washington: that as such reporter I re-

ported in machine shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, United States District Judge, held at Spokane, Washington, on Wednesday, September 7, 1955; that the within and foregoing is a full, accurate and complete transcript of the proceedings had in the above-entitled cause on that date.

Dated this 21st day of February, 1957.

/s/ DONALD B. ODEN,
Official Court Reporter.

[Endorsed]: Filed February 26, 1957. [88]

Chambers of Sam M. Driver
United States District Judge
Spokane 10, Washington

September 14, 1955.

Phipps & Phipps,
Attorneys for Plaintiffs,
223 Rookery Building,
Spokane 1, Washington;

Hamblen, Gilbert & Brooke,
Attorneys for Defendant,
General Electric Company,
912 Paulsen Building,
Spokane 1, Washington.

Gentlemen:

Re: Dam, et al. vs. General Electric Company, et al.

On September 7, I took under advisement motion of defendant General Electric Company to dismiss

the second amended complaint. One of the grounds of the motion is that, the joint venture agreement upon which plaintiffs rely was within the statute of frauds, the assumption being that the agreement was not in writing. Examination of the second amended complaint discloses that, paragraph XV, which covers the agreement, does not allege whether it was oral or in writing. I have considered it advisable, therefore, to first pass upon the defendant's motions to strike and for more definite statement, which also have been submitted. I have done so, and a copy of the resulting order will be mailed to you by the Clerk.

I have not reached any conclusion, or even finished my examination of the briefs on the motion to dismiss, and will not do so until the plaintiffs have complied with my order on the other motions. I assume that the motion of defendant General Electric to dismiss will be renewed after the more definite statement has been supplied.

I granted in part the motion to strike in order to keep the issues within manageable bounds, and to keep out potentially troublesome, immaterial factual allegations. I left standing enough of paragraph V of the second amended complaint to support the plaintiffs' position that Electric Bond & Share was a wholly owned, and completely dominated and controlled subsidiary of the defendant, General Electric. Whether or not the interrelationship of the two corporations and their corporate structures were such as to confuse and perpetrate

fraud and deceit on others dealing with Electric Bond & Share, seemed [34*] to me to be wholly immaterial to the issues in this case. It affirmatively appears in the second amended complaint that plaintiffs were not so confused, deceived, or defrauded. Plaintiffs allege (see paragraph XIV, line 12, et seq., p. 9) that Mr. Charles A. Coffin, representing defendant General Electric, told them that the corporation wholly owned and completely dominated and controlled Electric Bond & Share.

I also regarded as immaterial the allegations that General Electric created and maintained monopolies in certain fields. Considering the extent and magnitude of General Electric's operations, that issue alone, if contested, could well take many months to try.

Yours very truly,

....., United States District Judge.

SMD/b

cc—Clerk, United States District Court,
Eastern District of Washington.

Received September 14, 1955. [35]

*Page numbering appearing at foot of page of original Certified Transcript of Record.

[Title of District Court and Cause.]

ORDER GRANTING IN PART MOTIONS TO STRIKE AND FOR MORE DEFINITE STATEMENT

This matter came on for hearing before the Court on September 7, 1955, on motions of the defendant, General Electric Company, directed to the plaintiffs' Second Amended Complaint, and the Court has heard the argument of counsel, considered the written briefs submitted, and is fully advised in the premises.

It Is Now, Therefore, Ordered, with reference to the motion of defendant General Electric Company for More Definite Statement that, paragraph VIII of said motion, directed to paragraph XV of the Second Amended Complaint, is hereby granted, and the plaintiffs are directed to state the date of the alleged joint venture agreement, and whether the same was oral or in writing, and, if in writing, to set forth a copy thereof, and to further state what officer or agent entered into said agreement for and on behalf of the defendant, General Electric Company. Otherwise, and as to all other paragraphs thereof, said motion is denied.

It Is Further Ordered that, the motion of defendant General Electric Company to Strike is granted to the extent that there is hereby stricken from the plaintiffs' Second Amended Complaint all that portion of paragraph V following the words "own uses and purposes," on line 29, page 3, to the end of said

paragraph, and said defendant's motion to strike is otherwise, [36] and in all other particulars, denied.

It Is Further Ordered that, to relieve plaintiffs of the burden of rewriting their Second Amended Complaint, which consists of twenty-two typed pages, the plaintiffs may, if they desire, comply with this order by having the Clerk of this Court delete the portion of paragraph V hereby ordered stricken, by drawing a line through the same, without rendering it illegible; and by interlineation of paragraph XV of the Second Amended Complaint to conform to this order; or, by serving and filing a supplemental statement of paragraph XV in the nature of a bill of particulars, setting forth the more definite statements directed to be made by this order.

Dated this 14th day of September, 1955.

/s/ SAM M. DRIVER,
United States District Judge.

[Endorsed]: Filed September 14, 1955. [37]

[Title of District Court and Cause.]

CONSENT TO INSERTING AND DELETING CERTAIN MATTER IN PLAINTIFFS' SECOND AMENDED COMPLAINT

To: Hon. Stanley Taylor, Clerk, United States District Court, Eastern District of Washington.

In conformity with the Court's Order made in the above-entitled case on September 14, 1955, the

names of the Officers and Agents of the defendants acting in the oral Joint Venture Agreement made between said parties, in the year A.D., 1913, at New York City, New York, were Charles A. Coffin, Sidney Z. Mitchell with Henry Pierce coming in later to aid in the unfolding of said Agreement, and the Clerk of the above-entitled Court is hereby authorized to either file or insert these names as ordered by the Court to be named, and to delete that part of Paragraph V of said plaintiffs' Second Amended Complaint in conformity with the Order of the Court. Said insertions and deletions to be added to said plaintiffs' Second Amended Complaint in the way and in the places determined by the Clerk to be most convenient.

Respectfully submitted,

PHIPPS & PHIPPS,

/s/ HARVE H. PHIPPS.

[Endorsed]: Filed September 28, 1955. [38]

[Title of District Court and Cause.]

CONSENT TO INSERTING AND DELETING CERTAIN MATTER IN PLAINTIFFS' SECOND AMENDED COMPLAINT

To: Hon. Stanley Taylor, Clerk, United States District Court, Eastern District of Washington.

In conformity with the Court's Order made in the above-entitled case on September 14, 1955, please

insert the following amendments to our Second Amended Complaint:

(a) To delete that part of Paragraph V of said Second Amended Complaint, striking the comma after the words "uses and purposes" and insert in lieu thereof, a period, and delete the balance of said Paragraph V and for the purpose of the record, the plaintiffs reserve their objections to such deletions.

(b) As to the date of said Joint Venture Agreement, as set forth in plaintiffs' Second Amended Complaint, strike the comma after the second repetition of "New York" in Paragraph XIII of said Second Amended Complaint, and then insert the following—A.D., 1913.

(c) In Paragraph XV of plaintiffs' Second Amended Complaint, at the beginning of Line 4, strike the letter "a" and insert the following—"an oral."

(d) In Paragraph XV of said plaintiffs' Second Amended Complaint, after the comma, following the word "hand" in Line 7 and before the word "under" insert the following—A.D., 1913. [39]

The officers and agents of the defendants acting in the oral Joint Venture Agreement made between said parties in the year A.D., 1913, were Charles A. Coffin, Sidney Z. Mitchell, with Henry Pierce coming in later to aid in the unfolding of said Agreement.

I trust that you will find these amendments to be sufficient to comply with said Order, but if any additional insertions are necessary in your judgment to effectuate the purpose of the Order, you are fully authorized to make same.

Respectfully submitted,

PHIPPS & PHIPPS,

/s/ HARVE H. PHIPPS.

Service of copy acknowledged.

[Endorsed]: Filed September 30, 1955. [40]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant, General Electric Company, and moves the court with reference to the plaintiffs' Second Amended Complaint, as follows:

I.

To dismiss the action as to the General Electric Company for the reason that said Second Amended Complaint fails to state a claim against the defendant upon which relief can be granted.

II.

To dismiss the action on the ground that all the defendants named above are indispensible parties to said action and the defendants, American Power & Light Company and Electric Bond & Share Com-

pany, are not subject to service of process in the Eastern District of Washington or in the State of Washington, and the attempted service of process upon said defendants has been quashed pursuant to orders heretofore entered in the above-entitled cause.

III.

To dismiss the action on the ground that the claims asserted therein are void under the statute of frauds. [41]

IV.

To dismiss the action on the ground that the claims asserted therein are barred by the statute of limitations.

V.

To dismiss the action on the ground that the claims asserted therein are barred by reason of laches on the part of the plaintiffs.

/s/ PHILIP S. BROOKE,

/s/ L. R. HAMBLEN,

HAMBLEN, GILBERT & BROOKE,
Attorneys for Defendant
General Electric Company.

Service of copy acknowledged.

[Endorsed]: Filed October 7, 1955. [42]

[Title of District Court and Cause.]

AFFIDAVITS SUBMITTED BY GENERAL ELECTRIC COMPANY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

The defendant, General Electric Company, submits the following Affidavits in support of its Motion for summary judgment:

Affidavit of Ray H. Luebbe;

Affidavit of B. H. Kizer;

Affidavit of Philip S. Brooke.

/s/ PHILIP S. BROOKE,

/s/ L. R. HAMBLEN,

HAMBLEN, GILBERT & BROOKE,
Attorneys for Defendant
General Electric Company.

Service of the Within Affidavits Is Hereby Admitted this 13th Day of October, 1955.

/s/ HARVE H. PHIPPS,
Attorney for Plaintiff. [43]

Affidavit

Ray H. Luebbe, being duly sworn, deposes and says:

I am a vice president and am secretary and general counsel of General Electric Company. I have my office at 570 Lexington Avenue, New York 22, New York.

After the commencement of the action, Dam Brothers vs. General Electric Company, et al., in 1952, (District Court of the United States for the Eastern District of Washington, Northern Division) a search of the General Electric Company record files was conducted. These record files of the General Electric Company are maintained in or near Schenectady, New York. I have been advised that this search failed to reveal any correspondence or other documents concerning the existence of the alleged joint venture between the Dam Brothers and the General Electric Company or its alleged agents.

Mr. Charles A. Coffin was the first president of the General Electric Company. He died on July 14, 1926.

Mr. Sidney Z. Mitchell was formerly president of the Electric Bond & Share Company. He died on February 17, 1944.

/s/ RAY H. LUEBBE.

Sworn to before me this 6th day of October, 1955.

[Seal] /s/ MAE M. HAYWARD,
Notary Public.

Commission expires March 30, 1957. [44]

State of Washington,
County of Spokane—ss.

B. H. Kizer, being first duly sworn, on oath deposes and says:

That he is a member of the firm of Graves, Kizer, Greenough and Gaiser, formerly Graves, Kizer & Graves, and has been engaged in the practice of law in the City of Spokane, Washington, since 1902; that affiant's firm represented Violetta E. Pierce in those certain divorce actions entitled Henry J. Pierce vs. Violetta E. Pierce, reported in 68 Washington 415, 107 Washington 125, and 120 Washington 411; that as disclosed by the reports of said actions, Henry J. Pierce moved from New York City to Spokane, Washington, in 1909, and retained his residence in the State of Washington until subsequent to 1922; that by reason of the prolonged litigation between Henry J. Pierce and Violetta E. Pierce, affiant became very well acquainted with the said Henry J. Pierce.

That the said Henry J. Pierce who was affiliated with Electric Bond & Share Company has been dead for over twenty (20) years.

/s/ B. H. KIZER.

Subscribed and sworn to before me on this 7th day of October, 1955.

[Seal] /s/ PHILIP S. BROOKE,
Notary Public in and for Washington, Residing at Spokane. [45]

State of Washington,
County of Spokane—ss.

Philip S. Brooke, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for General Electric Company, one of the defendants in the foregoing action; that diligent search and inquiry has failed to disclose that "Priest Rapids Power Company," "Terminal Townsite Company" and "Tufa Natural Cement Company" or any of them, were ever incorporated pursuant to the Joint Venture Agreement alleged in the Second Amended Complaint as amended, to have been entered into in the year 1913; that as disclosed by the Certificate of Earl Coe, Secretary of State of the State of Washington, marked Exhibit "A" attached hereto and made a part hereof, none of said corporations were organized in the State of Washington or qualified to do business in said state at any time since prior to the date of the alleged Joint Venture Agreement.

/s/ PHILIP S. BROOKE.

Subscribed and sworn to before me on this 13th day of October, 1955.

[Seal] /s/ ROBERT E. BROOKE,
Notary Public in and for Washington, Residing at Spokane. [46]

EXHIBIT A

Certificate No. 31282

United States of America
State of Washington
Department of State

To All to Whom These Presents Shall Come:

I, Earl Coe, Secretary of State of the State of Washington and custodian of the Seal of said State, do hereby certify that the corporate records of this office show "Priest Rapids Power Company"; "Terminal Townsite Company" and "Tufa Natural Cement Company" have not qualified to do business in this state either as foreign or domestic corporations at any time subsequent to the year 1912.

In Testimony Whereof, I have hereunto set my hand and affixed hereto the Seal of the State of Washington. Done at the Capitol, at Olympia, this 11th day of October, A.D., 1955.

[Seal] /s/ EARL COE,
Secretary of State;

By /s/ RAY J. YEOMAN,
Assistant Secretary of State.

[Endorsed]: Filed October 14, 1955. [47]

[Title of District Court and Cause.]

AFFIDAVIT OF MILTON E. DAM

State of California,
County of Sacramento—ss.

Milton E. Dam, being first duly sworn, deposes and says:

That he is one of the plaintiffs in the above-entitled action.

That the plaintiffs believe in view of the extraordinary circumstances and conditions which caused and prompted the General Electric Company to desire and bring about the Joint Adventure Agreement between General Electric and Dam Brothers, justify and make necessary an explanatory and clarification statement concerning the contractual arrangements.

That the Joint Adventure Agreement between General Electric and the Dam Brothers was "Oral."

That the absence of a written agreement was absorbed by the acts, performances and accomplishments of the purpose of the General Electric plans —to operate without a written agreement was not the choice of Dam Brothers—they, the General Electric wanted it that way—until they could gain control of the Priest Rapids site and obtain workable federal water power legislation.

That the records will show why there was no written agreement, and hush hush and secrecy was demanded of Dam Brothers. [48]

That the names of the General Electric Company officials and agents were:

A. Mr. Charles A. Coffin, chairman of the board, founder and builder of the company, and one of the first developers of electric power;

B. Mr. Edwin W. Rice, Jr., president; associate and assistant to Mr. Coffin—inventor and a genius in the electrical field;

C. Mr. Sidney Z. Mitchell, originally with General Electric following college—called from the field by Mr. Coffin to help organize the Electric Bond & Share Company, made vice president, with an officer of General Electric as president of Electric Bond—but was president of same at the time of the New York meeting, 1913.

That the Dam Brothers knew little at that time regarding the Electric Bond but did know of and had great respect for the General Electric and its products and therefore went into the Joint Adventure meetings with faith and confidence in that great company and the individuals representing General Electric Company.

That the records will show it was wise and logical for General Electric to offer a concrete transaction to the Dam Brothers, which resulted in the Joint Adventure Agreement General Electric desired and made.

That it is not possible to name or designate a given day or date for the said Joint Adventure

Agreement between General Electric and Dam Brothers, for the reason that the meeting and conferences in New York covered a period of many days during April and May, 1913.

That the agreement could not be classed with the usual business agreement or contract, as the conferences were in the nature of a continuous and connecting presentation—unfolding gigantic plans of General Electric, with the purpose of having Dam Brothers join in and help as principals.

That the plans could not go forward without the association of Dam Brothers, their own Priest Rapids development plans, their interests, position and influence in state and federal officials.

That the long conferences with the review of very secret plans, how same should be undertaken with regard to federal legislation, acquisition of needed properties and minerals, discussing the problems and development features, arriving at decisions as the matters were worked out, from day to day over the long period.

That Mr. Coffin was the creator of and the forceful prime mover of the gigantic plan to benefit General Electric and the country—that the plans were practical dreams of Mr. Coffin, to lighten the burden of mankind, as well as create wealth—these plans came true in every phase with enormous benefit to General Electric, and its subsidiaries.

That it must be understood that Mr. Coffin was deeply interested in and actually developed and

built power plants and sold the electricity before he became the big manufacturer of electrical products by his new venture of organizing General Electric; never did confine his ability and efforts to solely manufacture; always had the ambition to bring about more and cheaper electric power, leaving an unequaled record of accomplishing just that. [49]

That it would be difficult to understand or make a true and factual appraisal of the whole General Electric-Dam Brothers affair and agreement, with all the normal questions and legal points, without a brief review of the life of Mr. Coffin, his plans for General Electric, and the work and performances of the men selected by Mr. Coffin to undertake these plans, with some quotations from prominent and authoritative publications.

"Science" of December 8, 1922, "The Charles A. Coffin Foundation."

"On May 16, 1922, Mr. Charles A. Coffin in his seventy-eighth year, retired from the active leadership of the General Electric Company. Mr. Coffin has been identified with the development of the electrical industry since 1882. He was founder and creator of the General Electric Company of which he has been the inspiration and leader for 30 years."

"The National Encyclopedia of American Biography," Vol. XX.

"For nearly twenty years was engaged in Shoe manufacturing and in financing. * * * Mr. Coffin

did more to create and stabilize the electrical industry than any other man or group of men. His encouragement of invention along useful lines, his financial talents, his tireless energy and his courage in introducing new apparatus made his work supreme in the field to which he devoted his life."

"Dictionary of American Biography Electrical Record," Aug., 1926.

"He interested himself keenly in the work of such men as Elihu Thompson, Edwin J. Houston, and Edwin W. Rice, Jr. In 1892 the Thompson-Houston Company was consolidated with the Edison General Electric Company, in which all the activities and interests of Edison's incandescent lamp development had been merged. Coffin was elected president of the new firm, which took the name of the General Electric Company, and he held that office until 1913. From 1913 to 1922 he was chairman of the board of directors.

"The growth of the General Electric Company under Coffin's leadership was phenomenal. Coffin supported the work of the Company's engineers in developing the Curtis Steam Turbine which revolutionized the primary power sources in Electric Light and Power stations."

"Engineering News Record," July 22, 29, 1926; Editorial.

"An Empire Builder" * * * Charles A. Coffin, builder of General Electric Company, will long live

as the organizing genius, who shaped one of greatest structures of manufacturing activity in the world's history. Moreover, he was wise enough to choose as his own successors, men who would carry his own work with equal breadth of vision and with equal understanding of the basic dependence of modern industry upon engineering and scientific progress."

"Forbes Financial Magazine," May 15, 1926.

"Mr. Coffin, founder and upbuilder of the General Electric Company, is the recognized dean of the whole electrical industry of the United States—in fact, of the world.

"The growth of electricity and America's world leadership in electricity are due more to Coffin's vision, industry and daring than to any other man living. [50]

"In discussing * * * in a note to the Editor of 'Forbes,' Mr. Coffin makes one of the few long statements regarding electricity, its contribution to the world, distribution, enormous possibilities, electric public utility enterprises, industrial power, transportation fields. Mr. Coffin said 'Electricity took over a most important task when it set itself to providing a better and cheaper means of manufacturing it.' "

That the General Electric with its subsidiary, International General Electric in London, and its interest in the German General Electric concern, Mr. Coffin was in position to learn of new major discoveries and inventions in the Electro-Metallurgical

and Electro-Chemical field in Europe—large users of electric power—none of which processes and plants had been built or in use in this country, but which were vital in peace and in war.

That one of the subjects considered most important as well as serious, yet very confidential, discussed during the Joint Adventure conferences in New York, was the favorable prospect of bringing some of the foreign processes and discoveries to Priest Rapids, not only to use the power to be made there, but for the good of the country, the farm and industry, to make available these imported products for peace time benefit and for the protection of our country in time of war.

That Mr. Coffin had formulated a practical plan for bringing about the development of water powers, and considered the Priest Rapids site on the Columbia River, State of Washington, as the "apple of his eye"—being then the most attractive for producing large blocks of low-cost power.

That the federal laws of 1906 and 1910 had caused stagnation in the development of water powers, and General Electric wanted to see the laws changed to permit the development at Priest Rapids.

That General Electric found itself in an unfavorable position on account of being called the "Power Trust" and the General Electric felt that no federal legislation could ever be obtained if the Company or its officers or interests were identified with the legislative work, or were behind such changes in

the laws. The records will show the extent of this unfavorable public and government feeling.

That the Dam Brothers with their strong position at Priest Rapids, their plans, position with the public and government officials, would give a favorable impression for the proposed federal legislation to permit a dam to be built at Priest Rapids. That the users of the power to be located at Priest Rapids would require important raw materials and minerals and that General Electric would have to have same investigated and located and in some instances even acquire to protect the sale of the power. That the Dam Brothers with their laboratory and own investigation could continue in the same way and not excite public interest.

That the Dam Brothers did visit the Capitol, Washington, D.C., and conferred with the leaders of both parties in Congress, the Secretary of Interior, and reported back to New York, with the favorable reception and promise of favorable introduction and action on a bill to permit the development of the Priest Rapids project—the move, which ended in finally obtaining the law that created the Federal Power Commission—that following its enactment, two billions of dollars of water power permits were filed, during the first year. The records will show the enormous benefit to the General Electric and its subsidiaries and interests. [51]

That unlike today, Mr. Coffin and Mr. Mitchell, both, were the organizers of the concerns they

headed back then, built them up and were personally interested in them, while the present officials are high executive employees.

That at the time of the General Electric-Dam Brothers Joint Adventure Agreement meetings, Mr. Coffin was 69 years old, and why he was anxious to see the federal legislation obtained, and the government license to build the dam at Priest Rapids, as an example and objective lesson—to be the "Niagara of the West"—an all electric city—electric power, industry, irrigation and agriculture—using the natural resources of the Northwest.

That Mr. Coffin was keenly disappointed that the federal water power legislation was not enacted until 1920, but realized that his practical dream and plans for the development of water power was now unfolding and possible of full expectations, with the broad benefit to the General Electric Company, in creating demand for heavy electric equipment, low-cost power for new and soon to be perfected various electrical appliances, and most of all for the stability of electric utility securities, as needed for financing.

That the retirement of Mr. Coffin on May 16, 1922, brought the first known public statement, which is historic and revealing now.

(President Woodrow Wilson signed the Water Power Bill, June, 1920.)

The statement by Mr. Coffin June 22, 1922:—

" 'Electric Age Just Begun,' Says Pioneer in Industry, 'and Future Is Enormous.'

"'Electricity has brought advantages to the country village and farm—well, watch what electricity is going to do next.

"'Electricity,' Mr. Coffin said, 'is not only the cleanest and most efficient servant of mankind, it is the cheapest' * * * 'its efficiency is being constantly increased.

"'Cloth will more and more be manufactured where the cotton is grown. Soon we will be sending the power across the country.

"'The outside world "closer." The radio has burst on us, motion pictures may be broadcast * * * in your own home, in Maine or Washington (Mr. Coffin was born in Maine and Priest Rapids in the State of Washington) * * * This Is Dreaming, of Course, for No One Can Predict With Any Accuracy Concerning Such Matters. Of one thing I Am Certain, That Is That We Are Just in the Beginning of the Electric Age.

"Mr. Coffin said in the early days, 'Electricity in those days was a thing you read about in the papers; promoting electricity was much more hazardous from the business standpoint than manufacturing shoes: the main thing was to get electricity to the people. We believed in it with a Holy Faith, if we hadn't we never should have dared the things we did.

"'We laid out our plans to establish central power plants in every place we could. We planted

plants everywhere. The plants like those of the New York Edison and the Philadelphia Electric are the outgrowth of the central power stations we established then.' "

(The Editor stated: "Mr. Coffin has received honors and decorations from governments throughout the world, but he wears them lightly. His picture is scarcely known to the newspaper reading public. He is modest in the [52] extreme.")

That the answers of the particular questions and points before the plaintiffs now cannot be found in the law books, but only from the statements of Dam Brothers, based upon the truth and facts pertaining to those points, as named in Sheets 1 and 2.

The whole General Electric-Dam Brothers affair was built upon Mr. Charles A. Coffin's plans for benefiting General Electric, and following his life's ambition to bring about development of water power, with the first development at Priest Rapids, and the expansion of uses for electricity in the plants of industry, the farm and home. The continuous and connecting acts, performances and vast expenditures made in connection with the Joint Adventure Agreement following its creation in 1913, as shown by the vast amount of evidence, represented Mr. Coffin's plans in action.

That the Dam Brothers as principals acted under a well defined understanding and carried out and carried thru effectively and faithfully their part of

the General Electric-Dam Brothers contractual arrangements, completely and to the letter. The Joint Adventure arrangement was broadened after the original date because of the conditions affecting the plans, whereby Dam Brothers were needed and performed additional important functions.

That during the Joint Adventure conferences, Dam Brothers were assured that the plans desired by and backed by the General Electric, would be carried; that with the start of the activities following the conferences, the Dam Brothers were to work with and operate under Mr. Mitchell, president of Electric Bond, which organization had the legal structure and engineering equipment; that the permanent organizations for the Power Company, the Terminal Townsite Company, for vital mining and minerals, would all be formed after the federal water power legislation had been obtained.

That as late as 8 years after the Joint Adventure conferences, following the enactment of the federal legislation, one of the main achievements accomplished, and Mr. Coffin was ready to retire at the age of 79, he still had to be consulted by Mr. Mitchell, and obtain Mr. Coffin's approval.

That of the important factors in Dam Brothers decision to join General Electric during the New York meeting, was the direct influence upon them of Mr. James Marwick, head of the International Financial Accounting and Consulting firm of Marwick, Mitchell, Peat & Company, 79 Wall Street,

New York, London and Paris—a personal friend of Mr. Coffin, and knew of the European processes which Mr. Coffin in his vision and ambition wished to bring to Priest Rapids—General Electric was a client of Mr. Marwick's firm, and has been to this date continuously.

That the questions dwelt upon continually by the defense, portraying ignorance of General Electric and officials identification, is ridiculous. The foregoing statements pertain to vital facts and subject matter which have been attacked in legal form, but, which can only be met and covered by the plaintiffs' Affidavit; and is only a brief outline of some facts, events, acts and performances.

/s/ MILTON E. DAM.

Subscribed and Sworn to before me this 27th day of October, 1955.

[Seal] /s/ MOLLIE L. SALK,
Notary Public in and for the
State of California.

Service of copy acknowledged.

[Endorsed]: Received and Filed November 2, 1955. [53]

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN W. BREMER

Defendant General Electric Company submits the attached Affidavit of John W. Bremer in support of its Motion for Summary Judgment.

/s/ PHILIP S. BROOKE,

/s/ L. R. HAMBLEN,

HAMBLEN, GILBERT & BROOKE,

Attorneys for Defendant General Electric Company. [54]

Affidavit

State of New York,
County of New York—ss.

I, John W. Bremer, being duly sworn, depose and say that I am assistant secretary of the General Electric Company; that I have examined the official records of said General Electric Company and that I find from such records that Edwin Wilbur Rice, Jr. was president of General Electric Company from 1913 to 1922 and died on November 25, 1935.

/s/ JOHN W. BREMER.

Signed and sworn to before me this 7th day of November, 1955.

[Seal] /s/ MAE M. HAYWARD,
Notary Public.

Commission expires March 30, 1957.

Service of copy acknowledged.

[Endorsed]: Filed November 10, 1955. [55]

Chambers of Sam M. Driver
United States District Judge
Spokane 10, Washington

January 3, 1956.

Phipps & Phipps,
Attorneys for Plaintiffs,
223 Rookery Building,
Spokane 1, Washington;

Hamblen, Gilbert & Brooke,
Attorneys for Defendant,
General Electric Co.,
912 Paulsen Building,
Spokane 1, Washington.

Gentlemen:

Re: Dam, et al. vs. General Electric Co., et al.—No. 1036

When I examined the original file in the above case recently, in my consideration of defendant's motion to dismiss, for the first time the letter of Phipps & Phipps, dated November 2, 1955, which had been attached to the inside of the Clerk's file cover, came to my attention. In that letter, plaintiffs' attorneys call attention to the affidavits filed by defendant's counsel, question their relevancy, and express the view that the Court should regard the motion strictly as a motion to dismiss and, consequently, consider only the allegations of the second amended complaint. I had assumed that these affidavits were submitted for the Court's consideration under the

provisions of Civil Rule 12 (b) quoted by Mr. Phipps on the first page of his letter. The provision is that, if, on motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to, and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material matters pertinent to such a motion by Rule 56. Rule 56 (b) authorizes a party against whom a claim is asserted to move at any time with, or without supporting affidavits, for a summary judgment in his favor. Rule 56 (c) provides that the motion shall be served at least ten days before the time fixed for the hearing, and that the adverse party, prior to the hearing, may serve opposing affidavits.

I propose to treat the motion to dismiss as a motion for summary judgment but, obviously, I should give the plaintiffs an opportunity to submit affidavits or other material matters if they care to do so. I shall, in any event, consider the affidavit [56] of plaintiff Milton E. Dam, dated October 27, 1955, which appears in the file, so far as its contents are pertinent to any issues raised by the motion. The plaintiffs will have until January 20, 1956, in which to file any additional affidavits or other matters which they wish to submit for the Court's consideration. Copies of any such affidavits or matters should be served upon opposing counsel prior to filing, and since it would not be feasible for me to undertake

to reach a decision before I return from Alaska in February, counsel on both sides will have until February 10, 1956, in which to file with the Clerk any supplemental brief or memorandum of additional authorities which they wish to present. I shall, of course, consider all briefs, memoranda, etc., heretofore submitted by counsel on the motion to dismiss.

I think we should bear in mind that it is not at all necessary for the plaintiffs to supplement their second amended complaint by affidavits setting forth further elaborating details. On motion for summary judgment, as well as on motion to dismiss, the Court will take the allegations of the pleading as true, and judgment can be awarded to the defendant only in case, as a matter of law, it is entitled to judgment on the undisputed facts. Affidavits submitted in support of the motion to dismiss will also be taken as true, insofar as they are not controverted or disputed by counter affidavits.

Yours sincerely,

....., United States District Judge.

SMD/b

cc—Clerk, U.S. Dist. Court.

Received January 4, 1956. [57]

[Title of District Court and Cause.]

AFFIDAVIT OF MILTON E. DAM

State of California,
County of Sacramento—ss.

Milton E. Dam, being first duly sworn, deposes and says:

That he is one of the plaintiffs in the above-entitled action.

That reference is made to the Further Additional Memorandum of General Electric Company Re: Motion for Summary Judgment, dated February 23, 1956, just received and noted by the undersigned.

That the General Electric by its continued attitude of ignoring and recognizing the meaning of the facts, conditions and circumstances as covered by the documents already filed in connection with this affair, with added self manufactured deductions which continue to disagree with the true facts, demand further statements of facts.

That the stress repeatedly placed on the conjecture and surmise that the plaintiffs were lax and late in bringing this action; the neglect to learn what was going on; the attempt to change the facts regarding the General Electric-Dam Brothers Joint Adventure affair, particularly as to the incorporations of the power company, the terminal and townsite company, and the other several factual

points which they try to underwrite the law involved.

That the above together with the continued inference for lack of any records, etc., the General Electric forces the plaintiffs to include in this statement references which relate to the Joint Adventure affair, its history and this case, which references it is believed will not be welcomed by General Electric, yet, in addition to close relation to the affair, is a dark chapter in the History of the General Electric, its interests and its high officials then.

That the undersigned has had continuous knowledge and relations with every development and event that affected and related to the General Electric-Dam Brothers Joint Adventure, for all the period referred to by the General Electric Memorandums, also, knew and was taken into private confidence regarding private matters of General Electric because of the bearing and relationship of this [58] affair.

That before going into the spectactular reference regarding General Electric in trouble which has a direct relation to and bearing upon the Joint Adventure affair together with meeting many of the assumptions, it is fitting to make an over all statement and denial and correction.

That the plaintiffs are now relying upon "an Oral" agreement. The conjecture is far from the truth and facts. The real circumstances and conditions which involved upwards of Ten Millions of

Dollars to accomplish the plans and purposes of the General Electric hidden under the Joint Adventure affair, created a structure from the Oral Agreement, with a mass of evidence, year by year.

That in connection with the General Electric plans and objective, there were performed and completed such items of the agreement as acquiring complete water power site lands and property; water and rail terminal lands, townsite and industrial site lands; mineral properties needed for construction purposes and power users, the cost of the other activities such as investigations, foreign processes, engineering, and finally Federal water power legislation.

That the plaintiffs were not only informed of every act and performance, but participated in many business transactions. That the statement plaintiffs sat by all this time without commencing action is ridiculous, and misleading. There was no laxity.

That the full period of time mentioned by the General Electric Memorandum can be accounted for without any excuses. The World War I contributed some to the delay in obtaining the favorable Federal Water Power legislation (enacted June, 1920). The writing of the Rules by the Government took one year following the enactment. The Preliminary Permit was not issued until March 3, 1921.

The General Electric did not want the power company or any of public creating acts such as incor-

porating, until the License was obtained for the same secret reason as plans had been carried on under the name of a dummy and the true identity hidden.

That the following period was consumed by continuous and connecting acts and performances, which with large expenditures were accepted by plaintiffs as good faith of General Electric, including diamond drilling, engineering plans, foreign process for use at Priest Rapids.

The unexpencted protests from fishing industry, years delay in having the Federal License granted, the renewed public attack of the Power Trust leveled at General Electric, the tremendous demand and launching of new power project, mergers, acquisitions; with the attack on General Electric breaking into a Government investigation; the sudden passing of Mr. Charles A. Coffin, followed just a year later, 1927, with the sudden passing also of Mr. Anson W. Burchard, president of International General Electric, who had been active in certain Joint Adventure activities as the evidence will fully sustain.

Then being overtaken by the World Wide Crash of October, 1929; the depression following; the plaintiffs were in New York during this period; then followed the Government major move to develop large hydroelectric projects, with private Utility interests in the West facing stagnation of their own plans; one of the high officials of our own Home Private Utility stated the starting of Cabinit

Gorge (about 1950-1) was the first for them since 1929.

That the non-starting of the building of the dam at Priest [59] Rapids, the filing of this action in 1952, the matter of Laches, the attempt to now apply other points to delay and defeat justice, just cannot be compared to any other case or agreement, there is no other comparative; the gigantic affair requires the full and connecting story and evidence from start to time of filing 1952.

That the General Electric was the only other party to the General Electric-Dam Brothers Joint Adventure Agreement and affair; that the claim of prejudice by the loss of time and the passing of three individuals, the presence of same would have eliminated any such legal action, the complete mass of connecting evidence would meet and dissolve oral statements, and are sufficient for the case.

That the General Electric should refer to its files on the Government investigation, disclosures and resulting affect on the Company and its relations to and bearing on the Joint Adventure, cracking open before the Federal License was obtained for the Priest Rapids dam; the continuing of the government investigation over many years, having much to do with the interruption of the starting of the construction of the dam at Priest Rapids.

That the plaintiffs were aware of most private details of the General Electric trouble, etc., and while it was no fault of theirs and they suffered from the

affair, their long associationship and work with the General Electric plans, and their makeup, reflected nothing but loyalty and even moral support—for such gigantic affair and attitude, can the General Electric now assert with respect such statements that would unfairly give other meanings.

That the conditions, circumstances and records will show the Joint Adventure main physical feature, Priest Rapids project, with the application of the law as covered by the Counsel under the Joint Adventure and also the statute references, together with the fact the undersigned has been in continuous attention with the events up to the filing, the project was just as attractive and its possibilities, up to the time plaintiffs realized action needed.

That the relation between Dam Brothers and General Electric was more than the business; Mr. Edwin W. Rice, Jr., and the mother of the plaintiffs were born in close neighboring small mid-western towns—and his mother was born in a small town further West where plaintiffs had blood relative lived and often visited.

That the Complaint and the Documents already filed contain honest to God facts and truth about this affair, and the mass of relating material has only been picked at here and there, and in respect for the request of the Court in letter of January 3, 1956, to not be elaborating in details, etc.

/s/ MILTON E. DAM.

Subscribed and sworn to before me this 9th day of March, 1956.

[Seal] /s/ JOHN M. BRUNTON,
Notary Public in and for the State of California,
Residing at Sacramento.

My Commission expires Nov. 29, 1957.

Receipt of Copy acknowledged.
[Endorsed]: Filed March 12, 1956. [60]

Chambers of
Sam M. Driver
United States District Judge
Spokane 10, Washington

Walla Walla

March Twentieth, 1956.

Phipps & Phipps,
Attorneys for Plaintiffs,
223 Rookery Building,
Spokane 1, Washington;

Hamblen, Gilbert & Brooke,
Attorneys for Defendant General Electric Co.,
912 Paulsen Building,
Spokane 1, Washington.

Gentlemen:

Re: Dam Brothers v. General Electric Co., et al.—No. 1036.

On March 12, 1956, plaintiffs' attorneys filed with the Clerk an additional affidavit of Milton E. Dam,

in the above case. Defendant's attorneys have requested that, if the affidavit is to be considered by the court they be granted an additional two weeks in which to respond.

In my letter to the attorneys of January 3, 1956, I stated that I proposed to treat the motion to dismiss as a motion for summary judgment, as provided in the Federal Rules of Civil Procedure, but I felt that the plaintiff should have an opportunity to submit affidavits or other material pertinent to the issues raised by the motion, and I gave the plaintiffs until January 20, to do so. I also allowed the attorneys for both parties until February 10, in which to file with the Clerk any supplemental brief or memorandum of additional authorities they wished to submit. I do not regard the dates mentioned as absolute deadlines, but an affidavit filed more than seven weeks after the specified time limit is not, I feel, timely.

Moreover, the document apparently was intended to be an answering argument directed to "the Further Additional Memorandum of General Electric Company Re: Motion for Summary Judgment, dated February 23, 1956." A litigant may not properly interpose a written argument or brief when he is adequately represented by counsel.

The affidavit contains little, if any, direct factual statement to which the affiant could testify if he were a witness in the case. For the reasons stated, it will not be considered in ruling upon defendant's motion. [61]

Yours very truly,

....., United States District Judge.

SMD/b

cc: Clerk, U. S. District Court.

[Endorsed]: Filed March 20, 1956. [62]

[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS OF DEFENDANT GENERAL ELECTRIC CO.

The defendant General Electric Company has filed herein a motion to dismiss the plaintiff's second amended complaint, which motion is based upon five separately stated grounds, the third, fourth and fifth of which are, respectively, as follows:

III.

To dismiss the action on the ground that the claims asserted therein are void under the statute of frauds;

IV.

To dismiss the action on the ground that the claims asserted therein are barred by the statute of limitations;

V.

To dismiss the action on the ground that the claims asserted therein are barred by reason of laches on the part of the plaintiffs.

The motion to dismiss is supported by affidavits filed on behalf of the moving defendant, and is opposed by counter-affidavits filed on behalf of the plaintiffs. It was understood that the court would treat the motion as a motion for summary judgment under the provision of Rule 12 (b) of the Rules of Civil Procedure. But Rule 8 (c) of the Civil Rules requires [63] that, in responding to a preceding pleading, a party shall set forth affirmatively, among other enumerated defenses, laches, statute of frauds, and statute of limitations; and the court has come to the conclusion that it would be inadvisable to pass upon defendant's motion as one for summary judgment before the said defendant has answered and pleaded laches, statute of frauds, and statute of limitations as affirmative defenses. Therefore, without passing upon the merits of the issues raised by defendant's motion to dismiss, it is now

Ordered that the motion of defendant General Electric Company to dismiss plaintiffs' second amended complaint is hereby denied, and the said defendant is allowed twenty days from and after the date of this order in which to answer plaintiffs' second amended complaint.

Dated this 29th day of May, 1956.

/s/ SAM M. DRIVER,
United States District Judge.

[Endorsed]: Filed May 29, 1956. [64]

Chambers of
Sam M. Driver
United States District Judge
Spokane 10, Washington

May Twenty-Ninth, 1956.

Hamblen, Gilbert & Brooke,
Attorneys for Defendant,
General Electric Company,
912 Paulsen Building,
Spokane 1, Washington.

Phipps & Phipps,
Attorneys for Plaintiffs,
223 Rookery Building,
Spokane 1, Washington.

Gentlemen:

Re: Dam Brothers vs. General Electric Co., et al.—No. 1036.

As I have heretofore indicated, it was my purpose to pass upon motion to dismiss of defendant General Electric Company as a motion for summary judgment under the provisions of Rule 12 (b) of the Rules of Civil Procedure. However, upon more critical examination of that particular section, I note its provision that, motion to dismiss may be treated as one for summary judgment, is limited to defense (6), namely, that the complaint does not state a claim on which relief can be granted. Defendant's motion to dismiss is based not only upon defense (6) but also asserts the defenses of laches,

statute of frauds, and statute of limitations. Rule 8 (c) specifically provides that the three defenses last named must be affirmatively pleaded, and it seems to me quite doubtful at least that such defenses could properly be passed upon by order on motion to dismiss treated as a motion for summary judgment.

I sincerely regret taking any action that may further delay the trial of this case, but since the controversy on which the action is based is of such long standing, and a trial obviously would be very expensive and time-consuming, I feel that, if possible, issues raised by the pleadings should be decided in advance of the trial. For that reason, without passing upon the merits of the defenses of laches, statute of frauds, or statute of limitations (I have not come to any conclusion whatsoever as yet), I am today entering an order, copy of which will be mailed to you by the Clerk of the court, denying defendant's motion [65] to dismiss. The order allows the defendant twenty days in which to answer the second amended complaint.

I assume General Electric Company in its answer will affirmatively plead the three defenses to which I have above referred, and will renew its motion as a motion for summary judgment. I see no reason why the motion then could not be considered and passed upon by the court on the basis of the complaint and answer, and affidavits and other factual material already submitted in connection with the motion to dismiss, and on counsels' various mem-

oranda and lists of authorities heretofore submitted on the motion.

In making the foregoing suggestions, I have in mind that the motion for summary judgment should be disposed of in sufficient time to permit setting the case for trial in the October term of court in Spokane, if the motion for summary judgment is denied, and plaintiff wishes to try it at that time.

Yours very truly,

....., United States District Judge.

SMD/b

cc—Clerk, U. S. District Court.

Received May 29, 1956. [66]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME TO ANSWER COMPLAINT

It is hereby stipulated by and between Plaintiffs and General Electric Company that said Defendant may have until July 10, 1956, to answer Plaintiffs' second amended complaint dated this 11th day of June, 1956.

/s/ HARVE H. PHIPPS,

PHIPPS & PHIPPS,
Attorneys for Plaintiffs.

/s/ PHILIP S. BROOKE,

HAMBLEN, GILBERT & BROOKE,

Attorneys for Defendant, General Electric Company.

[Endorsed]: Filed June 11, 1956. [67]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO ANSWER COMPLAINT

It appearing that the written stipulation on file herein of the Plaintiffs and the Defendant, General Electric Company extends the time for Defendant to answer the second amended complaint of the Plaintiffs to July 10, 1956;

Now therefore, It Is Ordered that the Defendant, General Electric Company, is allowed until July 10, 1956, in which to answer Plaintiffs' second amended complaint.

Dated this 12th day of June, 1956.

/s/ SAM M. DRIVER,
United States District Judge.

Presented by:

/s/ PHILIP S. BROOKE,
Attorney.

/s/ HARVE H. PHIPPS,
PHIPPS & PHIPPS.

[Endorsed]: Filed June 12, 1956. [68]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT GENERAL ELECTRIC COMPANY

In Answer to the First Cause of Action in the Second Amended Complaint of the Plaintiffs, the Defendant General Electric Company Admits, Denies and Alleges, as Follows:

I.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph I, and therefore denies the same.

II.

Answering paragraph II, defendant admits that the matter in controversy exceeds the sum of $3,000.00 exclusive of interest and costs, and alleges that it is without knowledge or information to form a belief as to the truth of the remaining allegations contained in said paragraph, and therefore denies the same.

III.

Admits the allegations contained in paragraph III.

IV.

Admits the allegations contained in paragraph IV.

V.

Answering paragraph V, defendant admits that on or about the 27th day of February, 1905, the defendant General Electric Company, acting [69] by

and through its duly qualified and authorized directors and officers, caused to be incorporated under the laws of the state of New York, the defendant Electric Bond & Share Company and that the defendant General Electric Company originally invested in and turned over to said Electric Bond & Share Company the sum of approximately one million three hundred thousand dollars ($1,300,000.00) in cash, and assigned, transferred and set over to said Electric Bond & Share Company miscellaneous securities it then owned having a par value of approximately four million two hundred fifty-eight thousand, one hundred fifty dollars ($4,258,-150.00), in return for which the said Electric Bond & Share Company issued and delivered to said General Electric Company all of its authorized and outstanding capital stock of said Electric Bond & Share Company, consisting of two million dollars ($2,000,000.00) par value of its common stock and two million dollars ($2,000,000.00) par value of its preferred stock, and denies the remaining allegations contained in said paragraph.

VI.

Admits the allegations contained in paragraph VI; except that defendant has insufficient knowledge or information to form a belief as to the truth of, and defendant therefore denies, the allegations that:

(a) that the area referred to

"is and has been arid or semi-arid, the soil of which is of a volcanic ash character, highly porous,

and very productive when irrigated, but which, in its natural state, because of its location and the character of its soil is, and has been, unproductive and covered with sage brush and other vegetation which could grow and thrive without irrigation."

(b) that the Columbia River

"has vast resources of water to be utilized and useful in the development of irrigation * * * and when harnessed by a dam * * * is capable of developing and generating and producing enormous electrical energy to be used and useful in the manufacturing and production of fertilizer, chemical products, pumping water for irrigation purposes, and other innumerable useful purposes."

VII.

Answering Paragraph VII, admits that the area or tract above [70] described as lying to the south of the Saddle Mountains and bounded as above described, has along its westerly boundary a portion of the Columbia River, which, because of the country surrounding it, and the vast amount of water behind it, is in its natural state a swiftly moving stream, dropping rapidly in elevation, and is known as and called "Priest Rapids," and denies the remaining allegations contained in said paragraph.

VIII.

Defendant alleges that it has insufficient knowledge or information to form a belief as to the truth

of the allegations in paragraph VIII, and therefore denies the same.

IX.

Defendant alleges that it has insufficient knowledge or information to form a belief as to the truth of the allegations in paragraph IX, and therefore denies the same.

X.

Answering paragraph X, admits that the Columbia River, at the site of said Priest Rapids, and above and below the same, is and was a navigable river, and alleges that it has insufficient knowledge or information to form a belief as to the remaining allegations contained in said paragraph, and therefore denies the same.

XI.

Answering paragraph XI, defendant admits that the Columbia River was a navigable stream, and by reason thereof was under the control of the federal government, and denies the remaining allegations contained in said paragraph.

XII.

Denies the allegations contained in paragraph XII.

XIII.

Denies the allegations contained in paragraph XIII.

XIV.

Answering paragraph XIV, defendant admits that one Charles A. [71] Coffin was a founder of de-

fendant, was its first president, and in 1913 and subsequent thereto was its Chairman of the Board, that one Sidney Z. Mitchell was in 1913 the president of Electric Bond and Share Company, and that in 1913 defendant was the sole stockholder of Electric Bond and Share Company, and denies the remaining allegations in said paragraph.

XV.

Denies the allegations contained in paragraph XV.

XVI.

Denies the allegations contained in paragraph XVI.

XVII.

Denies the allegations contained in paragraph XVI½.

XVIII.

Denies the allegations contained in paragraph XVII.

XIX.

Denies the allegations contained in paragraph XVIII.

XX.

Answering paragraph XIX, defendant denies that any of the acts or matters therein alleged were "in furtherance and as a part of the performance of the said joint venture agreement on their part to be performed"; and defendant alleges that it has insufficient knowledge or information to form a belief as to the truth of the other allegations contained therein, and therefore denies the same.

XXI.

Answering paragraph XX,

(a) defendant denies the allegation that

"at the suggestion and upon the insistence of the defendant General Electric Company and its subsidiaries under its direction and control, and against the wishes of the plaintiffs, made an attempt to secure legislation which would cover the development of hydro-electric power not only on navigable rivers and streams, but also on non-navigable rivers and streams, and would extend the life of the license or permits to a term of ninety-nine (99) years * * *";

(b) defendant admits that Congress enacted the Federal Water Power Act in 1920; and

(c) as to the other allegations in said paragraph XX, [72] defendant alleges that it has insufficient knowledge or information to form a belief as to the truth thereof and therefore denies the same.

XXII.

Defendant denies the allegations contained in paragraph XXI.

XXIII.

Defendant denies the allegations contained in paragraph XXII.

XXIV.

Answering paragraph XXIII, defendant denies all of the allegations contained therein, except that defendant admits the following facts:

1. That the public files of the Federal Power Commission, Washington, D. C., show that the Federal Power Commission issued a preliminary permit on March 3, 1921, to the Washington Irrigation and Development Company for a power project (Project No. 3) on the Columbia River at Priest Rapids; and

2. That a license was issued by said Commission to said Washington Irrigation and Development Company for said project on March 25, 1925.

XXV.

Denies the allegations contained in paragraph XXIV.

XXVI.

Denies the allegations contained in paragraph XXV.

XXVII.

Denies the allegations contained in paragraph XXVI except that defendant admits receiving a letter from plaintiffs dated June 14th, 1951, and admits that plaintiffs instituted the instant suit on or about July 16, 1952.

XXVIII.

Denies the allegations contained in paragraph XXVII (designated as "XXVI"), in the second amended complaint.

In Answer to the Second Cause of Action of the Second Amended Complaint, Defendant General Electric Company Admits, Denies and Alleges: [73]

I.

Denies each and every allegation, matter and thing contained in said paragraph I except as to those matters and things admitted in defendant's answer to the first cause of action.

II.

Denies each and every allegation, matter and thing contained in paragraph II.

In Answer to the Third Cause of Action Contained in the Second Amended Complaint of the Plaintiff, Defendant General Electric Company Admits, Denies and Alleges:

I.

Answering paragraph I, defendant admits that the Electric Bond & Share Company under the allegations of the second amended complaint is a proper party defendant to this action, and denies the remaining allegations contained in said paragraph.

Affirmative Defense

Further answering said second amended complaint and for an affirmative defense thereto, this defendant alleges:

First Defense

The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

The court lacks jurisdiction to determine this controversy, because American Power & Light Company, a foreign corporation, and Electric Bond & Share Company, a foreign corporation, alleged by the plaintiffs to be parties to the joint venture agreement referred to in the second amended complaint are indispensable parties to this action, but are not subject to the jurisdiction of the court, and as to whom the attempted service of process has been quashed, pursuant to orders heretofore entered in this cause.

Third Defense

That the joint venture agreement alleged to have been entered [74] into between the parties and this defendant in the year 1913, was never reduced to writing and signed by either of the parties, and by its terms was not to be performed within one year from the making thereof, and therefore void and unenforcable under Sec. 19.36.010 of the Revised Code of Washington.

Fourth Defense

The claim stated in the second amended complaint did not accrue within three years before the commencement of this action, and is therefore barred

by the provisions of Sec. 4.16.090 Revised Code of Washington.

Fifth Defense

That the joint venture agreement alleged to have been entered into between the plaintiffs and this defendant in the year 1913 (if it ever existed) was repudiated and abandoned by this defendant over 30 years ago; that the plaintiffs have been guilty of laches and unreasonable delay in bringing this action and are therefore barred from maintaining the same for the reason that the defendant has been greatly prejudiced and its position changed in the defense thereof, particularly by reason of the death many years ago of the officer and agent of the defendant corporation, General Electric Company, who allegedly entered into said agreement, namely, Charles A. Coffin, its former president; that this defendant has further been prejudiced by reason of the death of the officers and agents of the Electric Bond and Share Company who allegedly entered into said Joint Venture Agreement, namely Sidney Z. Mitchell, its former President, and Henry Pierce, former President of Washington Irrigation & Development Company; that defendant has been further prejudiced and its position changed in the defense of this action by reason of the fact that if any documents or records ever existed pertaining to said Joint Venture Agreement, the same have long ago been lost or destroyed and the defendant deprived of the proof necessary to defend this action.

Wherefore defendant prays that plaintiffs take nothing by their [75] action, and that the defendants do have and recover judgment against the plaintiffs for its costs of suit.

/s/ L. R. HAMBLEN,

/s/ PHILIP S. BROOKE,

HAMBLEN, GILBERT & BROOKE,
Attorneys for Defendant,
General Electric Company.

Service of copy acknowledged.

[Endorsed]: Filed July 10, 1956. [76]

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM J. DURKA

The Defendant General Electric Company submits the following Affidavit in support of its Motion for summary judgment:

Affidavit of William J. Durka

/s/ L. R. HAMBLEN,

/s/ PHILIP S. BROOKE,

HAMBLEN, GILBERT & BROOKE,
Attorneys for Defendant,
General Electric Company.

Affidavit

William J. Durka, being duly sworn, deposes and says:

1. I am a member of the bar of the State of New York and am an employee of General Electric Company. I have my office at 570 Lexington Avenue, New York 22, N.Y.

2. On March 19, 1956, I made a personal check of the public files of the Federal Power Commission, in Washington, D. C., to ascertain what those files showed, from the inception of the Federal Power Commission to date, regarding power projects at Priest Rapids on the Columbia River in the State of Washington.

3. I ascertained the following facts:

(a) On June 12, 1920, the Washington Irrigation & Development Co. applied, under the Federal Water Power Act of 1920, for a preliminary permit for a power project (Project No. 3) on the Columbia River at Priest Rapids. The permit was granted on March 3, 1921, and pursuant thereto a license was issued to the Washington Irrigation & Development Co. in March, 1925—the exact date was either March 5 or March 25 (the records conflict)—which, as amended on March 3, 1927, required that construction be commenced on or before March 1, 1929. This license was terminated by the Commission on June 14, 1929, because of the licensee's failure to commence construction within the time required.

(b) On February 28, 1929, the Washington Irrigation & Development Co. filed an application for a new license for the same project that had been previously licensed.

On May 19, 1930, the Commission voted to deny the second license application because the applicant had failed to submit satisfactory evidence of its ability to market the power to be produced by the dam and to finance the proposed development. The executive [78] secretary of the Commission was authorized by the Commission's said action of May 19, 1930, to reject the second license application on July 1, 1930, if the applicant failed to supply the required evidence prior to such date.

On July 2, 1930, the Commission's executive secretary wrote to the applicant that, the required showing not having been made, the second license application was denied, and the file was closed.

(c) There was no activity regarding Priest Rapids on the Columbia River in the State of Washington, so far as is shown by the public files of the Federal Power Commission, from the closing of the file on July 2, 1930, on Project No. 3 of the Washington Irrigation & Development Co. to July 16, 1952, when plaintiffs instituted the instant suit.

4. Attached to this affidavit are the following documents:

(a) A certified copy of the Federal Power Commission's docket sheets on In The Matter of Washington Irrigation & Development Co., Project No. 3.

These docket sheets detail the entire official history of Project No. 3.

(b) A certified copy of the above-mentioned letter of July 2, 1930, from the Commission's executive secretary to Mr. Henry J. Pierce, President, Washington Irrigation & Development Company.

(c) The minutes of the meeting of the Federal Power Commission held on May 19, 1930, insofar as they pertain to Priest Rapids, as reported in the Commission's Tenth Annual Report.

/s/ WILLIAM J. DURKA.

Subscribed and sworn to before me this 15th day of June, 1956.

[Seal] /s/ VIRGINIA C. HOGAN,
Notary Public. .

My Commission Expires March 30, 1958. [79]

Minutes of the One Hundred and Fifth Meeting (May 19, 1930) of the Federal Power Commission (As Reported In Appendix A of "Tenth Annual Report of the Federal Power Commission: 1930" For the Fiscal Year Ended June 30, 1930)

Pages 120-121:

"REJECTION OF APPLICATION

"The executive secretary stated that Washington Irrigation & Development Co. was granted a pre-

liminary permit on March 3, 1921, for a power project (No. 3) on the Columbia River, in Grant, Kittitas, and Yakima Counties, Wash., and pursuant thereto a license was issued March 25, 1925, which, as subsequently amended, required that construction be begun on or before March 1, 1929. This the licensee was unable to do, and the commission, at its ninety-eighth meeting, on June 14, 1929, voted to terminate the license. The company had, on February 28, 1929, made application for a new license for the same project. This application is incomplete, in that the exhibits and general design drawings do not fully comply with the rules and regulations of the commission, and the plans and analyses of the proposed structures are inadequate to enable the commission's staff and representatives to reach a decision as to their safety, stability, and adequacy. The applicant was requested to submit by May 1, 1930, a definite showing of its ability to market the power and finance the development. This it has been unable to do. It is accordingly recommended that the application for license be rejected.

"The commission thereupon took action as follows:

"In the matter of the application of Washington Irrigation & Development Co., a corporation organized under the laws of the State of Maine, for a license under the Federal water power act for a power project (No. 3) on Columbia River, in Grant, Kittitas, and Yakima Counties, State of Washington, involving the construction of a dam, power

house, and appurtenant works: Said applicant having failed to submit satisfactory evidence of its ability to market the power and finance the development, the commission authorized the executive secretary to reject said application on July 1, 1930, provided that prior to such date the applicant has failed to supply the required evidence." [80]

XP-3-Washington
Washington Irrigation & Development Co.

July 2, 1930.

Mr. Henry J. Pierce,
President, Washington Irrigation & Development Company,
3 Rector Street,
New York, N.Y.

Dear Sir:

As you were notified by my letter of May 20, 1930, the Commission as its meeting of May 19, voted to authorize the rejection of your application for license for your proposed power development on Columbia River, unless on or before July 1, a satisfactory showing could be made of ability to finance the project and market the power.

No such showing having been made, you are hereby notified that your application is hereby rejected and the case closed as of this date.

Very truly yours,

F. E. BONNER,
Executive Secretary.

FFH/HLA

3 Copies to Chief of Engineers,
2 copies to Bureau of Fisheries.

Duly certified.

Service of copy acknowledged.

[Endorsed]: Filed July 10, 1956. [83]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

The defendant, General Electric Company, a corporation, by its undersigned attorneys, hereby moves the court to enter summary judgment for this defendant and in support of said motion in accordance with the provisions of Rule 56 (b) and (c) of the Rules of Civil Procedure the defendant refers this Court to the Affidavits of Ray H. Luebbe, B. H. Kizer, Philip S. Brooke, John W. Bremer, and Milton E. Dam, and counsel's various memoranda and lists of authorities heretofore submitted in connection with defendant's motion to dismiss this action. In addition, in order to clarify the exact dates of official actions by the Federal Power Com-

mission regarding Priest Rapids, an affidavit of William J. Durka is submitted herewith.

/s/ L. R. HAMBLEN,

/s/ PHILIP S. BROOKE,

HAMBLEN, GILBERT & BROOKE,
Attorneys for Defendant,
General Electric Company.

Service of copy acknowledged.

[Endorsed]: Filed July 10, 1956. [88]

[Title of District Court and Cause.]

MOTION FOR ADJOURNMENT OF HEARING ON SUMMARY JUDGMENT MOTION

Come now the plaintiffs and move the court for an order continuing and adjourning the hearing on the motion of the defendant, General Electric Company, for summary judgment herein under Rule 56 of the Federal Rules of Civil Procedure until the trial of the above-entitled action under the issues of facts alleged in the plaintiffs' Second Amended Complaint and denied by the defendant, General Electric Company, in its answer filed herein July 10th, 1956, for the reasons and upon the grounds that there are genuine issues of material facts in this action and because of such issues the court cannot determine as a matter of law that the de-

fendant is entitled to a summary judgment under the said Rule.

This motion will be based upon all of the records and files in this action, including the records of the proceedings heretofore had in this court in connection with the settlement and formation of the issues herein, and the affidavit of Harve H. Phipps, Sr., attached hereto.

Dated this 20th day of July, 1956.

PHIPPS & PHIPPS,

By /s/ HARVE H. PHIPPS, SR.,
Attorneys for Plaintiffs. [89]

[Title of District Court and Cause.]

AFFIDAVIT OF HARVE H. PHIPPS, SR., IN SUPPORT OF MOTION FOR ADJOURNMENT OF HEARING OF MOTION FOR SUMMARY JUDGMENT

State of Washington,
County of Spokane—ss.

Harve H. Phipps, Sr., being first duly sworn on his oath, says that he is one of the attorneys for the plaintiffs in the above-entitled action and makes this affidavit on behalf of said plaintiffs in support of plaintiffs' motion for adjournment of the hearing on defendant's motion for summary judgment under

Rule 56 of the Federal Rules of Civil Procedure filed herein July 10th, 1956.

As more fully appears from the records and files herein, summons and complaint herein were served prior to and were filed herein July 16th, 1952, the defendant General Electric Company, a corporation, by dilatory motions and other tactics has delayed the joining of issue herein until July 9th, 1956, when it served its answer herein, which was filed in this court July 10th, 1956, and on the same days of serving and filing its answer, the said defendant General Electric Company, a corporation, also served and filed a Motion for Summary Judgment, for the obvious purpose of further delaying the trial of this action on the issues raised and joined by plaintiffs' Second Amended Complaint and the Answer [90] of the defendant, General Electric Company.

An inspection and examination of the allegations in plaintiffs' Second Amended Complaint in connection with the admissions and denials contained in the answer of the defendant, General Electric Company, discloses that there are genuine issues of material facts, which will require the production of evidence to resolve, and which cannot be determined from the pleadings, depositions and admissions, or the affidavits on file herein, and more in particular as follows:

I.

By paragraphs I and II of its answer the defendant, General Electric Company, denies knowledge

or information sufficient to form a belief as to the citizenship and residence of the plaintiffs and further denies knowledge or information sufficient to form a belief as to whether or not the General Electric Company, a corporation, was organized and existing under laws foreign to the state of Washington.

II.

That whereas it is admitted in paragraph V of said answer that the defendant, General Electric Company, caused the Electric Bond & Share Company to be incorporated under the laws of the state of New York and further admits that:

> "the defendant, General Electric Company, originally invested in and turned over to said Electric Bond & Share Company the sum of approximately one million three hundred thousand dollars ($1,300,000.00) in cash, and assigned, transferred and set over to said Electric Bond & Share Company miscellaneous securities it then owned having a par value of approximately four million two hundred fifty-eight thousand, one hundred fifty dollars ($4,258,150.00), in return for which the said Electric Bond & Share Company issued and delivered to said General Electric Company all of its authorized and outstanding capital stock of said Electric Bond & Share Company, consisting of two million dollars ($2,000,000.00) par value of its common stock and two million dollars ($2,000,000.00) par value of its preferred stock,"

and the said defendant, General Electric Company, in and by said paragraph V of said answer denies the following allegations in [91] said paragraph V of plaintiffs' Second Amended Complaint, to wit:

First

After admitting that the defendant, General Electric Co., caused the incorporation of the corporation Electric Bond & Share Company, such defendant denies: That said corporation was organized,

> "for the apparent and ostensible object and purpose, on the part of the said General Electric Company (1) to realize as fully as possible upon various utility securities which it had acquired in the process of selling and disposing of its manufactured equipment; (2) to obtain for itself, the said General Electric Company, a direct proprietary stake or interest in a promising young industry, that is to say, the production and development of electrical and other power, with which industry it was then closely related and affiliated; and, (3), to utilize the position it would acquire as a proprietary factor in the utility industry to capitalize and advance the sales of equipment and appliances manufactured, developed and improved, or to be manufactured, developed or improved by said General Electric Company * * *";

and further, after admitting that in return for transferring to Electric Bond & Share Company

certain cash and securities, as above admitted, the defendant, General Electric Company, denies that:

> "thereby the General Electric Company became the company holding all of the issued and outstanding common and preferred stock of Electric Bond & Share Company, and was and became what is commonly known and described variously as the 'holding company,' the 'parent company' or the 'dominant company,' and by and through such stock ownership, and the voting rights and powers reposed in it by reason of such stock ownership, the said General Electric Company in all things dominated and controlled the management, activities, acts and actions of the defendant Electric Bond & Share Company, and by such domination and control the defendant General Electric Company used the purported corporate entity of the defendant Electric Bond & Share Company for its own uses and purposes, and there was thereby created a confusion of corporate entities so as to mislead and deceive third persons dealing with the said defendant Electric Bond & Share Company, and the purported corporate entity of said Electric Bond & Share Company was in truth and in fact a fiction, and the fiction of such purported separate legal entity of the defendant Electric Bond & Share Company was used by the defendant General Electric Company as a means in perpetrating an ostensible fraud and deception upon persons dealing with

the said Electric Bond & Share Company, a purported separate legal entity, incorporated, organized and existing for the declared objects and purposes, among others, of buying, selling, handling and dealing in bonds and other securities, principally of utility companies, and was in truth and in fact a mere tool or business conduit of the defendant General Electric Company, through which the said defendant General Electric Company utilized and employed it as a means of perpetrating a monopoly not only for the sale [92] and distribution of its manufactured electrical equipment, appliances and products, but, as hereinafter set out, to monopolize the creation, production and manufacturing of electrical and other power, and the distribution of the same and the development and use of water and water power for irrigation and other purposes, and the procuring of sites, lands and mineral deposits, building and other materials, useful and to be used in the development of power projects, in all of which ventures the said dominant or parent corporation, General Electric Company, used and utilized the defendant Electric Bond & Share Company for the purpose of financing and raising funds by the sale of bonds and other securities to the investing public, and as the direct and proximate result of its dominion and control of the said Electric Bond & Share Company, and the financial aid and assistance created for the General Electric Company by the

> defendant Electric Bond & Share Company, said General Electric Company was able to and did become the world's largest manufacturing company of electrical appliances and equipment, dominating and monopolizing a great or major portion of the field of such industry, and in addition thereto, as hereinafter set out, created and dominated the field of the manufacturing and distribution of electrical energy and power as well as developing water power in the production, creation and manufacturing of such electrical energy and power, all of which was made possible through the fiscal and financial agency of the defendant Electric Bond & Share Company, so dominated and controlled by the General Electric Company."

It is the position of the plaintiffs that by the denial of the above-quoted portions of paragraph V of plaintiffs' Second Amended Complaint the defendant General Electric Company has created issues of material facts, which cannot be resolved without evidence and that the defendant is not entitled to summary judgment under Rule 56, Federal Rules of Civil Procedure, and particularly under subdivision (c) of said Rule which only authorizes or permits the court to direct the entry of a summary judgment:

> "* * * if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to judgment as a matter of law."

III.

That with reference to paragraph VI of defendant's answer, responsive to paragraph VI of plaintiffs' Second Amended Complaint, although the defendant has admitted certain allegations therein contained, the defendant has pleaded lack of knowledge or [93] information sufficient to form a belief, and therefore denies the allegations of said paragraph VI quoted as (a) and (b) in said paragraph VI of defendant's answer, and thereby created an issue of fact, which will require the plaintiffs to produce evidence as to such allegations, and such issue cannot be determined by the court as a matter of law, but must be *must be* determined as a matter of fact on evidence to be produced by the plaintiffs.

IV.

With reference to paragraph VIII of defendant's answer, responsive to paragraph VIII of plaintiffs' Second Amended Complaint, the defendant has pleaded that it has insufficient knowledge or information to form a belief as to the truth of the allegations in said paragraph VIII, and therefore denies the same, which will require the plaintiffs to produce evidence as to such allegations, and such issues cannot be determined by the court as a matter of law, but must be determined as a matter of fact, on evidence to be produced by the plaintiffs. The same is true with reference to paragraph IX of

defendant's answer, responsive to paragraph IX of plaintiffs' Second Amended Complaint.

V.

With reference to paragraph X of defendant's answer, responsive to paragraph X of plaintiffs' Second Amended Complaint, although the defendant admits in its answer that the Columbia River at the site of Priest Rapids and above and below the same is and was a navigable river, the defendant alleges that it has insufficient knowledge to form a belief as to the other allegations of said paragraph X of said Second Amended Complaint and on that ground denies the same, which will require the plaintiffs to produce evidence as to such other allegations, and such issues cannot be determined by the court as a matter of law, but must be determined as a matter of fact, on evidence to be produced by the plaintiffs. [94]

VI.

With reference to paragraph XI of defendant's answer, responsive to paragraph XI of plaintiffs' Second Amended Complaint, although the defendant admits that the Columbia River was a navigable stream and by reason thereof was under the control of the Federal Government, the defendant denies that:

> "For a time, covering a period of approximately three years prior to 1913, the defendant General Electric Company had under consideration the project of developing the Priest

Rapids site on said Columbia River primarily as a source of electrical power and energy, for which purpose it would be necessary to span the said Columbia River from bank to bank and construct a high dam across said river, * * *"

and thereby created issues of material facts which cannot be resolved without evidence, and cannot be determined as a matter of law.

VII.

With reference to paragraphs XII and XIII of defendant's answer, responsive to paragraphs XII and XIII of plaintiffs' Second Amended Complaint, the defendant has denied the allegations of both of said paragraphs XII and XIII, thereby creating issues of material facts which cannot be resolved without evidence, and cannot be determined as a matter of law.

VIII.

With reference to paragraphs XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII and XXVIII of the defendant's answer, responsive to paragraphs XIV, XV, XVI, XVI½, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI and XXVII of plaintiffs' Second Amended Complaint, the defendant has denied the material allegations of said paragraphs, and thereby created issues of material facts which cannot be resolved without evidence, and cannot be determined as a matter of law.

IX.

With reference to all of defendant's answers to the Second and Third Causes of Action in plaintiffs' Second Amended Complaint, the defendant has denied all of the material allegations [95] of said Second and Third Causes of Action and thereby created issues of material facts which cannot be resolved without evidence, and cannot be determined as matters of law.

It will be noted from the allegations of the Second Amended Complaint, and particularly the paragraph designated XVI thereof, under the joint venture agreement the plaintiffs agreed on their part to perform certain acts and aid, assist, work and cooperate with the General Electric Company and/or "subsidiaries, subholding corporations and agents" in accomplishing the objects and purposes of such joint venture agreement, and the defendant has generally denied such allegations, thereby creating a material issue of fact. However, in view of the admission in the paragraph designated V of defendant's answer that the defendant General Electric Company caused Electric Bond & Share Company to be incorporated and caused all of the capital stock, both common and preferred, to be issued to it, and dominated and controlled the said Electric Bond & Share Company, and of the Findings of the Securities and Exchange Commission In the Matter of Electric Bond and Share Company, American Power & Light Company and other corporations therein named, found in Vol. 11 of Securities and

Exchange Commission Reports and Decisions, found commencing on page 1146, that the American Power & Light Company was a mere subsidiary of Electric Bond and Share Company, and the further fact that American Power & Light Company, in turn caused the incorporation of Washington Irrigation & Development Company, and that the plaintiffs in performing their portion of the joint venture agreement worked and co-operated with all three corporations. Electric Bond & Share Company, American Power & Light Company and Washington Irrigation & Development Company, the defendant can furnish great aid to the court in reaching a sound and proper conclusion with reference to the joint venture agreement affecting the Priest Rapids Project by admitting these facts instead of evading the true facts and requiring the plaintiffs to make this proof the "hard" way. [96]

There are so many disputed facts and controversial matters in this case as appear from the Second Amended Complaint and the defendant's answer, that it would take an endless amount of time, and work to discuss them all, a considerable amount of which can be avoided if the Federal Rules of Civil Procedure, and particularly Rule 1, that the rules shall be construed "to secure the just, speedy and inexpensive determination of every action" are followed and respected.

What the plaintiffs desire in this case is an opportunity to present the facts to the court, free from legal technicalities and dilatory tactics, so that a

just, speedy and inexpensive determination of this action can be had.

To the end that the court may have the benefit of the Report and Decision of the Securities and Exchange Commission in the above-mentioned decision, I am handing you herewith Volume 11 of the Securities and Exchange Commission's Reports and Decision in which you will find the above-mentioned case, commencing at page 1146.

/s/ HARVE H. PHIPPS.

Subscribed and sworn to before me this 31st day of July, 1956.

/s/ HARVE H. PHIPPS, JR.,
Notary Public, State of Washington, Residing at Spokane, Washington.

Service of copy acknowledged.

[Endorsed]: Filed July 31, 1956. [97]

[Title of District Court and Cause.]

ORDER STRIKING MOTION FOR ADJOURNMENT OF HEARING ON SUMMARY JUDGMENT MOTION

Prior to July 31, 1956, defendant General Electric Company had filed herein a motion for summary judgment supported by affidavits. The court had the motion under advisement and had indicated that counter affidavits submitted by plaintiffs in resist-

ance to a former motion for summary judgment would be considered also. On the above-mentioned date, plaintiffs filed herein a "Motion for Adjournment of Hearing on Summary Judgment Motion." The "grounds" of the motion, as stated therein, are "that there are genuine issues of material facts in this action and because of such issues the court cannot determine as a matter of law that the defendant is entitled to a summary judgment * * *."

There is no basis in the Rules of Civil Procedure for a motion to adjourn a motion. Moreover, plaintiffs' motion merely raises by another separate motion an issue now before the court for determination on defendant's motion for summary judgment.

Now, Therefore, plaintiffs' motion for adjournment of hearing on summary judgment motion is Ordered stricken, and the clerk of this court is directed to strike the same from the files in the above-entitled cause.

Dated this 8th day of August, 1956.

/s/ SAM M. DRIVER,
United States District Judge.

[Endorsed]: Filed August 8, 1956. [98]

Chambers of
Sam M. Driver
United States District Judge
Spokane 10, Washington

Pasco,

August Eighth, 1956.

Phipps & Phipps,
Attorneys at Law,
Columbia Building,
Spokane, Washington;

Hamblen, Gilbert & Brooke,
Attorneys and Counselors,
Paulsen Building,
Spokane 1, Washington.

Gentlemen:

Re: Dam Brothers v. General Electric Co., et al.—No. 1036.

On my own motion, I have entered an order striking plaintiffs' motion to adjourn defendant's motion for summary judgment. There is no provision in the rules for such a motion. In the present case it merely presents again a crucial question before the Court on the summary judgment motion; namely, as to each affirmative defense alleged by defendant, is there a genuine issue of material fact? If there is such an issue, the motion will be denied.

I wish to avoid establishing a precedent for a motion to adjourn a motion. If it is allowable in the instant case, I see no reason why it could not

be used against motions to dismiss, motions for more particular statement, et cetera.

The rules provide for a motion for summary judgment and, when a party in good faith files such a motion he has the right to have it decided by the Court. I think the motion in the instant case was presented in good faith to secure, if possible, a ruling on the defendant's affirmative defenses without a protracted, expensive trial on other disputed factual issues. Much of the delay, of which plaintiffs now complain, has been due to the Court's insistence that the affirmative defenses be pleaded in an answer before the motion for summary judgment could properly be made or considered. And I thought it was understood that in passing upon the motion I would consider all the relevant material—factual and legal—in the file of the case.

Plaintiffs' motion to adjourn the motion, if it were not stricken, would delay rather than expedite a trial on the merits. The motion would have to be set down for hearing at the next [99] motion day in Spokane, which will be early in October. I intend to rule on the motion for summary judgment before the end of this month.

Yours very truly,

....., United States District Judge.

SMD/b

cc: Clerk, United States District Court.

Received August 9, 1956. [100]

[Title of District Court and Cause.]

OPINION OF THE COURT

Honorable Sam M. Driver, Judge.

Defendant, General Electric Company, has moved for summary judgment. The motion is based upon a number of grounds, but only limitation and laches, set up as affirmative defenses in defendant's answer, will be discussed. The others clearly appear to involve genuine issues of material fact and will not, therefore, be considered.

The second amended complaint, as further amended by deletion and interlineation, consists of three "causes of action," The third involves only a defendant not now before the court. The allegations of the first "cause of action," insofar as they are pertinent to the present inquiry, may be briefly summarized as follows:

The plaintiffs, who had for some time conducted investigations, surveys, and studies of the feasibility of developing and utilizing the Priest Rapids site on the Columbia River in the state of Washington (primarily for the irrigation of a large area of adjacent arid land, and, secondarily, for the generation of electric power), in 1910 formed a partnership for the furtherance of that project. The partnership operated under the name of Dam Brothers and through the contributions of the individual members, and by their joint efforts, the partnership acquired the control of the lands in what was known as the Priest Rapids Highlands Project, consisting of approximately 135,000 acres

of land owned by approximately 1000 landowners. Originally plaintiffs contemplated diverting the waters of the river for irrigation without constructing a dam or other obstruction to navigation.

For about three years prior to 1913, defendant had been considering the development of the Priest Rapids site, primarily for electric power purposes by the construction of a high dam across the river. Defendant encountered serious difficulties, however. It discovered that its plans would interfere with the project of plaintiffs and that the Columbia River was a [102] navigable stream under the control of the Federal government, and that the development of a hydroelectric power project at Priest Rapids was not feasible until favorable amendment of the Federal laws pertaining thereto could be secured.

On learning of such obstacles, defendant proposed to plaintiffs that they jointly develop the Priest Rapids project for both power and irrigation purposes and suggested that a meeting be held in New York City to work out the details of such a joint enterprise.

The meeting was held and the principal representative of defendant was Charles A. Coffin, originally its president and then chairman of its board of directors. Defendant also was represented by Sidney Z. Mitchell, President and Managing Director of Electric Bond & Share Company (a corporation completely dominated and controlled by defendant), and Henry Pierce, also connected with Electric Bond & Share Company. As a result of the meeting and negotiations carried on in the year

1913, the plaintiffs, and the defendant through its agents Coffin, Mitchell and Pierce, entered into an oral joint venture agreement for the development of the Priest Rapids site.

In the joint venture agreement, the plaintiffs on their part agreed to (1) abandon their own plans to develop Priest Rapids and join with defendant in the development thereof; (2) assist in securing additional power and industrial sites and lands to be turned over to defendant and its subsidiaries for construction of a dam for the generation of power and for irrigation purposes upon the passage of favorable Federal legislation; (3) make available to defendant all of plaintiffs' "records, investigations, field logs, field work and knowledge" with reference to the irrigation and power development; (4) jointly acquire with defendant 55,000 acres controlled by plaintiffs, being railroad grant lands, and to endeavor to secure control over other privately-owned lands in furtherance of the irrigation feature of the joint project; and (5) employ plaintiffs' resources and efforts to obtain the enactment by the Congress of the United States of favorable [103] water power legislation which would make it feasible to develop the Priest Rapids site.

On its part, defendant by the joint venture agreement, undertook to (1) "allot" to plaintiffs $500,000 worth of common stock of a corporation to be known as the Priest Rapids Power Company which defendant would cause to be organized and incorporated with par value capital stock of $40,000,000

upon the passage of favorable legislation affecting the Priest Rapids power site; (2) give plaintiffs a 30% interest in a land-holding "syndicate" to be formed immediately following the making of the joint venture agreement for the purpose of acquiring the 55,000 acres of railroad grant land, which syndicate was to be jointly controlled by plaintiffs and defendant; (3) deliver to plaintiffs a 10% stock interest in corporations to be formed, to be known as the Terminal Townsite Company "and other companies" for the purpose of developing industrial and transportation facilities in the vicinity of the Priest Rapids site, which corporations were to be formed and organized "immediately following" the passage of favorable Federal power site legislation; (4) allot and deliver to plaintiffs a 10% interest "in any and all of the various syndicates or corporations" to be formed or organized for the purpose of acquiring or developing mineral rights, minerals, and building materials in connection with the Priest Rapids project; and (5) directly and through its subsidiaries, furnish all necessary funds and pay all expenses "during the preconstruction and construction period," and "diligently prosecute all necessary activities and perform all acts necessary or required for the fruition and realization of the plans and prospects of the parties for the development of said Priest Rapids site for power and irrigation purposes."

Plaintiffs generally performed their part of the joint venture agreement and specifically assisted in

various ways in securing the enactment of favorable water power legislation by the Congress of the United States. The passage of the legislation was delayed because of the insistence of the defendant upon the inclusion of provisions which the Congress would not accept; but such legislation was enacted into law in March, 1920. [104]

In further performance of the joint venture agreement plaintiffs acquired "for the land syndicate formed for such purpose" the 55,000 acres of land for irrigation, and other lands; and acquired Tufa mineral deposits immediately adjacent to the proposed dam and townsite, which deposits, it was agreed, were to be turned over to a corporation to be organized as the Tufa Natural Cement Company.

After the enactment of the favorable water power legislation in 1920, defendant through its various subsidiaries procured a permit, and later, a license, to construct the proposed dam at Priest Rapids, and performed preliminary diamond drilling and engineering work in preparation for the construction of the dam. The permit was granted about the year 1925. Defendant assured plaintiffs that it intended to proceed immediately with the construction of the proposed project, and plaintiffs believed and relied upon such assurance.

Defendant at no time abandoned the performance of the joint venture agreement on its part and at all times advised and assured plaintiffs that it still intended to proceed with the proposed plans, which assurance plaintiffs believed and relied upon, but

defendant was hindered and delayed in the prosecution of the work by the general economic depression which began in 1929, and, later on, by the Second World War.

Just prior to the commencement of the action, plaintiffs learned that a subsidiary of defendant had secretly sold and disposed of lands of the land syndicate, thus putting it beyond the power of the defendant to perform the joint venture agreement. On June 14, 1951, plaintiffs made written demand upon defendant to complete the performance of the joint venture agreement, to which demand there was no response. The present action was then instituted promptly. (The complaint was filed on July 16, 1952.)

As a direct and proximate result of defendant's failure to perform the joint venture agreement, and the necessary change of position of plaintiffs brought about by the performance of their part of the agreement, plaintiffs have been injured and damaged in the total sum of $8,550,000. [105]

In the second cause of action plaintiffs incorporate by reference all the allegations of the first cause of action, and in addition thereto allege in substance that defendant used the knowledge, experience and efforts of the plaintiffs during the period covered by the joint adventure and as a result thereof obtained favorable Federal water power legislation "and other advantageous positions and situations" from which defendant received "enor-

mous profits'' which cannot now be determined by these plaintiffs.

In the prayer of the second amended complaint the court is asked to find that (1) the parties made the joint venture agreement; (2) the defendant has ''wholly failed, neglected and refused to complete, carry out and perform * * *'' the same, and has ''put it beyond its power to so perform''; and (3) as a result of defendant's failure to perform, the plaintiffs have materially changed their position and have been injured and damaged thereby in the sum of not less than $8,550,000.

The following additional uncontroverted facts appear in affidavits and other documents filed in support of the motion for summary judgment:

Charles A. Coffin, who was the first president of General Electric Company, was 69 years of age when the oral joint venture agreement was alleged to have been made in 1913. He retired in 1922, and died July 14, 1926. Henry J. Pierce died at some time prior to 1935. Sidney Z. Mitchell, a former president of Electric Bond and Share Company, died February 17, 1944.[1]

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[1]In an affidavit resisting the motion for summary judgment, plaintiff Milton E. Dam mentioned Edwin W. Rice, Jr., ''President, associate and assistant of Mr. Coffin,'' as taking some part in the making of the oral joint venture agreement, but according to an uncontradicted counteraffidavit, Edwin W. Rice, Jr., who was president of defendant corporation from 1913 to 1922, died November 25, 1935.

Diligent search and inquiry by one of defendant's attorneys has failed to disclose that Priest Rapids Power Company, Terminal Townsite Company, or Tufa Natural Cement Company were [106] ever incorporated, and the records of the Secretary of State of the State of Washington, the official custodian of corporate records, show that none of the three corporations just named has qualified to do business in that state either as a foreign or domestic corporation, subsequent to the year 1912.

The following appears from the records of the Federal Power Commission in Washington, D. C.: On June 12, 1920, the Washington Irrigation & Development Co.,[2] under the Federal Water Power Act of 1920, applied for a preliminary permit for a power project (Project No. 3) on the Columbia River at Priest Rapids. The permit was granted on March 3, 1921, followed by the issuance of a license to the company in March, 1925. A requirement of the license was that construction be commenced on or before March 1, 1929. The license was terminated by the Commission on June 14, 1929, because of the licensee's failure to commence construction within the required time. On February 28, 1929, the company had filed an application for a new license for the same project, which second application was denied by the Commission on July 1, 1930, for the reason that the applicant had failed to submit satis-

[2]For the purpose of deciding the motion for summary judgment it will be assumed that the company was a dominated subsidiary and agent of defendant.

factory evidence of its ability to market the power to be produced and to finance the proposed development. On July 2, 1930, the Commission's executive secretary notified the applicant by letter that the second application was denied and the file was closed. Thereafter, there was no activity regarding Priest Rapids on the Columbia River in the state of Washington after rejection of the application and closing of the file on Project No. 3 of the Washington Irrigation and Development Company to July 16, 1952, when the present action was instituted.

This court's jurisdiction is based upon the diversity of citizenship of the parties and the substantive law to be applied is the law of the state of Washington.[3] The parties are to have the same kind of trial they would have in the state court, [107] and any law of the state which would substantially affect the outcome of the lawsuit must be regarded as substantive and be followed by the federal court.[4] It is a well-established general rule that all matters of procedure, such as the limitation of time in which an action may be brought, where the limitation per-

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[3]Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188.

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[4]Guaranty Trust Co. v. York, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079; Angel v. Bullington, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832; Ragan v. Merchants Transfer Co., 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520; Woods v. Interstate Realty Co., 337 U.S. 535, 69 S.Ct. 1235, 93 L.Ed. 1524.

tains to the remedy rather than the right, are governed by the law of the forum.[5] It is my view, therefore, that the law of the state of Washington is controlling as to whether or not plaintiffs' action was commenced within the time limited by law.

Plaintiffs' first cause of action clearly appears to present a claim for damages for breach of an oral contract. Plaintiffs in one of their written briefs referred to it as an action for specific performance of a contract. The reference is not warranted in view of the allegations of the second amended complaint that, defendant has by its conduct made performance on its part impossible. Moreover, one of the principal objects of the contract was the construction of a dam across the Columbia River at the Priest Rapids site for the generation of electrical energy, and the court will take judicial notice that a permit for the building of such a dam at the same site has been issued by the Federal Power Commission to the Grant County Public Utility District, and at least preliminary work on the project has been commenced. RCW 4.16.080, subd. (3), provides that, "An action upon a contract or liability express or implied, which is not in writing, and does not arise out of any written instrument" must be commenced within three years after the cause of action accrued. The statute by its express terms applies to plaintiffs' first cause of [108] action.

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[5]Restatement, Conflict of Laws, § 585, p. 702; 15 C.J.S. Conflict of Laws, § 22, p. 948.

The second cause of action presents a claim for recovery for unjust enrichment of the defendant. Although an action based on such a claim is equitable in its nature,[6] the Washington State Supreme Court has squarely and unequivocally held in two recent cases that the three-year statute of limitations mentioned above is applicable to an action for unjust enrichment.[7]

Both causes of action must depend upon the existence of the oral contract. The first, as has been stated, is to recover damages for its breach. The second, which necessarily must be alternative, is based upon the principle that, if for any reason the contract is legally unenforceable, then plaintiffs are entitled to recover for the unjust enrichment of defendant which has resulted from the performance by plaintiffs of their obligations under the contract. The right of action on both causes of action accrued when defendant breached the contract and made it clear by its acts and conduct that its part of the contract would not be performed.

By the oral joint venture contract, defendant agreed immediately after the passage of Federal water power legislation to organize a corporation to be known as the Priest Rapids Power Company

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[6]Bill v. Gattavara, 34 Wn. 2d 645, 650, 209 P. 2d 457. See, also, Lloyd v. Ridgefield Lbr. Ass'n, 38 Wn. 2d 723, 231 P. 2d 613.

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[7]Halver v. Welle, 44 Wn. 2d 288, 266 P. 2d 1053 (En Banc, Feb. 19, 1954); Geranios v. Annex Investments, 45 Wn. 2d 233, 273 P. 2d 793.

with a capital stock of $40,000,000, and to turn over $500,000 worth of the stock to the plaintiffs; to organize a corporation to be known as the Terminal Townsite Company, and transfer 10% of the stock to plaintiffs; and diligently to build a dam across the Columbia River at the Priest Rapids site, and allied works for the generation of electrical energy, and the irrigation of arid lands. The passage of the Federal water power legislation occurred in March, 1920. There is no allegation that defendant caused any corporations to be incorporated or transferred any stock in any corporation to the plaintiffs. It may properly be [109] inferred from the defendant's uncontroverted showing on that point that no corporation was ever organized. Defendant's failure to do so breached the contract. Defendant did not build the dam and plaintiffs did not commence their action until 32 years after the passage of the Federal water power act. Defendant did procure a license from the Federal Power Commission to build the dam, it is true, but the license was finally canceled and the file closed on July 2, 1930. The file was never reopened. The very fact that defendant during the ensuing 19 years made no further application for a permit to build the dam should have been sufficient indication to anyone making inquiry that the project had been abandoned so far as defendant was concerned. Under the facts as above stated, it seems clear that plaintiffs' causes of action must have accrued at least 3 years prior to July 16, 1952. Let us assume that under the same state of

facts plaintiffs had brought this same action against defendant on July 1, 1949. What, may we suppose, would have been the prospects of a successful defense to the action on the ground that it had been prematurely brought—that 29 years was not a sufficient, reasonable time to allow defendant for performance of its part of the oral agreement?

In the numerous written memoranda and lengthy affidavits submitted by plaintiffs and their attorneys, expression is repeatedly given to the thought that the instant case is a very unusual one and, because of its peculiar circumstances, plaintiffs are entitled to equitable relief and the statute of limitations should not be interposed to bar recovery. If both causes of action should be regarded as equitable in character, recovery would nevertheless be precluded because of laches on the principles announced and applied by the Supreme Court of Washington in Teeter v. Brown, 130 Wash. 506, 228 Pac. 291, and Kilbourne v. Kilbourne, 156 Wash. 439, 287 Pac. 41. In each of the cases the plaintiff had remained inactive and failed to make inquiry or take measures for self-protection for a period considerably shorter than the period of time involved in the instant case. In Teeter v. Brown, supra, the reason for the court's decision is clearly stated in the following quotation from the opinion, beginning on page 509: [110]

"It is probable that the complaint alleges sufficient to show that the respondent has acted fraudulently, but in a case of this character that is not

sufficient. The appellant owed some duty to himself. The law of self-protection may not be written into our statute books, but every man knows it is a part of human nature. Appellant's interest in the claim was initiated in 1901. Almost at once thereafter the alleged fraudulent acts of respondent commenced. Within a short time he took from the mine more than a million dollars, and yet appellant did not learn of these frauds and of these facts until 1919. What active steps did he take during all these years to learn whether he was being defrauded? Apparently none. What did he do to protect his own property rights? Apparently nothing. He knew he had an interest in this property and that he was dealing with a comparative stranger; and yet, for fifteen or eighteen years, he did nothing to learn the condition of the property or its value, or what was being done with it, or who was claiming it. It would seem that the slightest investigation on his part would have led him to facts and circumstances pointing to the fraud alleged and indicating the great value of the mine. It would seem impossible that such a large amount of value could be taken from such a small tract of land without all the public within the vicinity being acquainted with the fact. For fifteen or eighteen years the appellant sat idly by. Meanwhile some of the persons acquainted with the facts have died, and the great lapse of time has dimmed the memory of others. After fifteen years of inaction, he calls upon us. Such a voice does not stir the conscience of a court of

chancery. Ordinarily, equity puts out its assisting arm only to those who have shown a disposition to help themselves." [111]

Plaintiffs have cited Washington cases on the point that, lapse of time alone is not sufficient to constitute laches—that there must also be shown some disadvantage to the party asserting the defense. The cases are not in point here. In the present case, plaintiffs' action is based upon an oral contract alleged to have been made in 1913, and they did not commence the action until 1952, eight years after all of the individuals whom they claim acted for the defendant corporation in making the contract had died. The plaintiffs, according to the allegations of their own pleading, did not make a formal written demand upon the defendant for the performance of the oral contract until 1951, many years after the last survivor of defendant's potential witnesses regarding the oral agreement had passed away. It is difficult to imagine a litigant being put to more serious disadvantage than to be called upon to defend against an eight and one-half million dollar lawsuit based upon a 39-year-old oral contract, when the only witnesses who could possibly testify in behalf of the defendant as to whether or not the contract was actually made, and, if so, as to what were its terms and conditions, have been dead for eight years or more.

In McKnight v. Basilides, 19 Wn. 2d 391, 143 P. 2d 307, the Washington State Supreme Court had

occasion to apply the principle above mentioned that, laches does not arise from lapse of time alone, but there must also be involved some intervening change in the condition or relation of the parties adversely affecting the rights of the party sought to be charged. The case is factually distinguishable from the instant one, but it is significant that, in discussing the subject of laches, Judge Simpson, who wrote the court opinion, made the following comment (p. 403):

"The lapse of time did not obscure any evidence in this case. All of the witnesses who could have testified relative to the situation and condition of the property in 1929 were available at the trial of this case, and there is no showing that any material documents were lost or destroyed." [112]

If the Washington 3-year statute of limitations does not apply, recovery is precluded by laches.

Defendant's motion for summary judgment is granted.

/s/ SAM M. DRIVER,
United States District Judge.

[Endorsed]: Filed August 27, 1956. [113]

[Title of District Court and Cause.]

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The motion of the defendant, General Electric Company, for a Summary Judgment, pursuant to Rule 56 of the Rules of Civil Procedure, having been presented and the Court being fully advised, and having filed herein its written Memorandum of Opinion, it is now

Ordered that defendants' motion for a Summary Judgment be and the same is hereby granted.

Dated this 30th day of August, 1956.

/s/ SAM M. DRIVER,
United States District Judge.

Presented by:

/s/ PHILIP S. BROOKE,
Of Attorneys for General Electric Co.

Service of copy acknowledged.

[Endorsed]: Filed August 30, 1956. [114]

United States District Court for the Eastern District of Washington, Northern Division

No. 1036

MILTON E. DAM and EVERETT S. DAM, Co-partners Doing Business Under the Firm Name and Style of DAM BROTHERS,

Plaintiffs,

vs.

GENERAL ELECTRIC COMPANY, a Foreign Corporation; AMERICAN POWER & LIGHT COMPANY, a Foreign Corporation, and ELECTRIC BOND & SHARE COMPANY, a Foreign Corporation,

Defendants.

SUMMARY JUDGMENT

The motion of the defendant, General Electric Company, for a Summary Judgment, pursuant to Rule 56 of the Rules of Civil Procedure, having been presented and the Court being fully advised,

The Court finds that the defendant, General Electric Company, is entitled to a Summary Judgment as a matter of law.

It Is, Therefore, Ordered, Adjudged and Decreed that the said defendants' motion for a Summary Judgment be and the same is hereby granted; that the plaintiffs have and recover nothing by the suit;

and that the defendant, General Electric Company, go hence without day.

Dated this 30th day of August, 1956.

/s/ SAM M. DRIVER,
United States District Judge.

Presented by:

/s/ PHILIP S. BROOKE,
Of Attorneys for General Electric Co.

Receipt of copy acknowledged.

[Endorsed]: Filed August 30, 1956. [115]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The District Court of the United States for the Eastern District of Washington, Northern Division: Stanley D. Taylor, Clerk thereof, and—

To: General Electric Company, a Foreign Corporation, Defendant-Respondent: and—

To: Hamblen, Gilbert & Brooke, its Attorneys:

You, and each and all of you will please take notice that the above-named plaintiffs, as appellants, do hereby appeal from the above-entitled

Court to the United States Court of Appeals for the Ninth Circuit from the whole of the Summary Judgment rendered and entered by the Court herein, under date of August 30th, 1956, and the plaintiffs-appellants will seek by such appeal to have reviewed all intermediate Orders affecting the plaintiffs-appellants rendered and entered by the Court in the above-entitled cause, including the Order Striking the Plaintiffs' Motion for Adjournment of Hearing on Defendant's Motion for Summary Judgment, dated and filed August 8th, 1956. [116]

You will further take Notice that the above-named plaintiffs, as appellants, have filed herein their Bond on Appeal, as required by Rule 73(c) of the Federal Rules of Civil Procedure.

Dated this 25th day of September, 1956.

PHIPPS & PHIPPS,

/s/ HARVE H. PHIPPS,
Attorneys for Plaintiffs-Appellants.

Affidavit of mail attached.

Service of copy acknowledged.

[Endorsed]: Filed September 26, 1956. [117]

[Title of District Court and Cause.]

BOND FOR COSTS

Know All Men by These Presents:

That we, Dam Brothers, a partnership consisting of Milton Dam and Everett Dam, as Principal, and the Fidelity and Deposit Company of Maryland as Surety, are held and firmly bound unto General Electric Company, a foreign corporation, its executors, administrators, or assigns, in the sum of Two Hundred Fifty and no/100ths ($250.00) Dollars, lawful money of the United States of America, to be paid unto the said General Electric Company, a foreign corporation, its executors, administrators, or assigns, to which payment well and truly to be made, we do bind and oblige our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 13th day of September, 1956.

Whereas, the above-named Dam Brothers, as plaintiffs heretofore citizens of the State of Washington, commenced an action in the United States District Court, in and for the Eastern District of Washington, Northern Division, against the said defendants.

Now Therefore, the Condition of This Obligation Is Such, That if the above-named Dam Brothers, appellants to the Circuit Court of Appeals, Ninth Circuit, in the said action shall pay on demand, all

costs that may be adjudged, or awarded against them as aforesaid in said action; then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Signed and sealed this 13th day of September, 1956.

DAM BROTHERS,
a Co-partnership;

By /s/ HARVE H. PHIPPS,
Attorney.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

By /s/ A. B. KALIN,
Attorney-in-Fact.

Approved Sept. 27, 1956.

/s/ SAM M. DRIVER,
U. S. District Judge.

[Endorsed]: Filed September 26, 1956. [124]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD AND DOCKETING APPEAL

It Appearing to the Court from the records and files herein, and on application of the plaintiffs, that it is necessary that the time for filing the record on appeal and docketing such appeal in the

office of the Clerk of the United States Court of Appeals, Ninth Circuit, be enlarged and extended as herein provided,

It Is Ordered that under the provisions of Rule 73(g) of the Federal Rules of Civil Procedure, the time for filing the record on appeal and for docketing such appeal in the office of the Clerk of the United States Court of Appeals, Ninth Circuit, be and is hereby enlarged and extended to December 20th, 1956.

Dated and done at Spokane, in the Eastern District, Northern Division, of the District Court of the United States, this 22nd day of October, 1956.

/s/ SAM M. DRIVER,
Judge of District Court.

Presented by:

/s/ HARVE H. PHIPPS,
Attorney for Plaintiffs.

[Endorsed]: Filed October 22, 1956. [125]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed, by and between the parties to the above-entitled action through their respective Attorneys, as follows: Phipps & Phipps, by Harve H. Phipps, Sr., as Attorneys for the plaintiffs, and Hamblen, Gilbert &

Brooke, by Philip S. Brooke, and Cooley, Crowley, Gaither, Godward, Castro & Huddleson, by William W. Godward, as Attorneys for the defendant General Electric Company, a Corporation, as follows:

1. That on the presentation of this Stipulation to the Judge of the above-entitled Court, the Court may make and enter its Order, under Rule 73 (g) of the Federal Rules of Civil Procedure, enlarging and extending the time for filing the record on Appeal and docketing the Appeal in the Office of the Clerk of the United States Court of Appeals, Ninth Circuit, to and including the 20th day of December, 1956, and,

2. That on the presentation of this Stipulation to the Judge of the above-entitled Court, the Court may make and enter its Order directing, authorizing and permitting the Clerk of the above-entitled Court to accept for filing and file in his Office as a part of the record in this case, an Amendment to the Statement of Points to Be Relied Upon on Appeal filed by plaintiffs under date of [126] September 25, 1956, and particularly that portion thereof designated "Point No. 6," by which amendment said Point No. 6 is amended to read in full as follows:

"Point No. 6

"Whereas, the trial Court in its Opinion on which it bases its decision in this case has taken judicial notice of the fact that since the commencement of this action there has been organized the

It Is Hereby Ordered that the Clerk of the above-entitled court be and he is hereby directed to accept for filing and to file in his office as a part of the record in this case, the following Amendment to the Statement of Points to Be Relied Upon on Appeal filed by the plaintiffs under date of September 25th, 1956, and particularly that portion thereof designated "Point No. 6," by which amendment said Point No. 6 is amended to read in full as follows:

"Point No. 6

"Whereas, the trial Court in its Opinion on which it bases its decision in this case has taken judicial notice of the fact that since the commencement of this action there has been organized the Grant County Public Utility District which has obtained a license to survey the Priest Rapids site for the purpose of construcing [129] a Dam or Power Site at Priest Rapids, the trial Court wholly fails to take judicial notice, also a matter of public record, that since the commencement of this action the defendant General Electric Company, through one of its Subsidiary Companies, has sold and transferred the fifty-five thousand (55,000) acres of Railroad Grant lands, and Power Sites, Townsites, Industrial Sites and Terminal sites lands acquired through the efforts of the plaintiffs, Dam Brothers, in their performance of the Joint Venture Agreement, and has distributed to the plaintiffs a portion of the proceeds derived from such sales, clearly indicating that the defendant held this land in trust,

under the Joint Venture Agreement, and recognizing rights in the plaintiffs under such joint venture agreement."

It Is Further Ordered that this order is made and based upon the Stipulation of the parties dated October 24th, 1956, and filed herein, in which Stipulation the General Electric Company reserves the right to question (a) the relevancy, materiality or correctness of any of the matters set forth in said stipulation or any part thereof, or (b) the right of the plaintiffs to so amend said Statement of Points to Be Relied Upon on Appeal or any part thereof or the power of the Court to permit any amendment thereto or any part thereof, and further reserving the right upon said amendment being filed to file any pleading in opposition thereto in answer or objection, including a motion to strike, which it may deem appropriate.

Dated and done at Spokane, in the Northern Division of [130] the Eastern District of Washington, this 31st day of October, 1956.

/s/ SAM M. DRIVER,
Judge of the Above-Entitled Court.

Presented by:

/s/ HARVE H. PHIPPS,
Attorney for Plaintiffs-Appellants.

[Endorsed]: Filed October 31, 1956. [131]

[Title of District Court and Cause.]

AMENDMENT TO POINT No. 6 OF STATEMENT OF POINTS ON APPEAL

Pursuant to the Stipulation of the parties dated October 24th, 1956, filed herein, and the Order of the above-entitled court entered thereon, dated and filed October 31st, 1956, Point No. 6 of the plaintiffs-appellant's Statement of Points to Be Relied Upon on Appeal, filed herein under date of September 25th, 1956, is hereby amended to read as follows:

"Point No. 6

"Whereas, the trial court in its Opinion on which it bases its decision in this case has taken judicial notice of the fact that since the commencement of this action there has been organized the Grant County Public Utility District which has obtained a license to survey the Priest Rapids Site for the purpose of constructing a Dam or Power Site at Priest Rapids, the trial Court wholly fails to take judicial notice, also a matter of public record, that since the commencement of this action the defendant General Electric Company, through one of its subsidiary companies, has sold and transferred the fifty-five thousand (55,000) acres of Railroad Grant Lands and Power Sites, Townsites, Industrial Sites and [132] Terminal Site Lands acquired through the efforts of the plaintiffs, Dam Brothers, in their performance of the Joint Venture Agreement, and has distributed to the plaintiffs a portion of the

proceeds derived from such sales, clearly indicating that the defendant held this land in trust under the Joint Venture Agreement, and recognizing rights in the plaintiffs under such Joint Venture Agreement."

Dated this 5th day of November, 1956.

PHIPPS & PHIPPS,

By /s/ HARVE H. PHIPPS,
Attorneys for Plaintiffs-
Appellants.

Service of copy acknowledged.

[Endorsed]: Filed November 5, 1956. [133]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the originals filed in the above-entitled cause:

Second Amended Complaint, filed 11/5/53.

Order quashing service and dismissing as to Electric Bond and Share Co., filed 11/21/52.

Order quashing service and dismissing as to American Power and Light Co., filed 4/9/53.

Motion to make Second Amended Complaint more definite and certain, filed 8/25/55.

Motion to Strike, filed 8/25/55.

Motion to Dismiss, filed 8/25/55.

Affidavit of Milton E. Dam, filed 9/2/55.

Copy, Letter of Judge Driver, dated 9/14/55.

Order granting in part motions to strike and for more definite statement, filed 9/14/55.

Consent to inserting and deleting certain matters in Plaintiffs' Second Amended Complain, filed 9/28/55.

Consent to inserting and deleting certain matters in Plaintiffs' Second Amended Complaint, filed 9/30/55.

Motion to Dismiss, filed 10/7/55.

Affidavits of Ray H. Luebbe, B. H. Kizer and Philip S. Brooke, and Certificate of Earle Coe of October 11, 1955, filed 10/14/55.

Affidavit of Milton E. Dam, filed 11/2/55.

Affidavit of John W. Bremer, filed 11/10/55.

Copy, Letter of Judge Driver, dated 1/3/56.

Affidavit of Milton E. Dam, filed 3/12/56.

Copy, Letter of Judge Driver, dated 3/20/56.

Order denying motion to dismiss of General Electric Co., filed 5/29/56.

Copy, Letter of Judge Driver, dated 5/29/56.

Stipulation extending time to answer Second Amended Complaint, filed 6/11/56.

Order extending time to answer Second Amended Complaint, filed 6/12/56.

Answer of Defendant General Electric Co., filed 7/10/56.

Affidavit of William J. Durka and attached exhibits, filed 7/10/56.

Motion for Summary Judgment, filed 7/10/56.

Motion for adjournment of hearing on Motion for Summary Judgment with attached affidavit, filed 7/31/56.

Order striking motion for adjournment of hearing on Summary Judgment motion, filed 8/8/56.

Copy, Letter of Judge Driver, dated 8/8/56.

Opinion of the Court, filed 8/27/56.

Order granting motion for Summary Judgment, filed 8/30/56.

Summary Judgment, filed 8/30/56.

Notice of Appeal, filed 9/26/56.

Statement of Points to Be Relied Upon on Appeal, filed 9/26/56.

Bond for Costs on Appeal, filed 9/26/56.

Order extending time for filing record and docketing appeal, filed 10/22/56.

Stipulation, filed 10/30/56.

Order amending and supplementing Statement of Points to Be Relied Upon on Appeal, filed 10/31/56.

Amendment to Point No. 6 of Statement of Points on Appeal, filed 11/5/56.

Designation of Contents of Record on Appeal, filed 9/26/56.

Defendant-Appellee's Designation of Contents of Record on Appeal, filed 10/2/56.

and that the same constitute the record for hearing of the appeal from the judgment of the United States District Court Court for the Eastern District

of Washington, in the United States Court of Appeals for the Ninth Circuit, as called for in Appellants' Designation of Contents of Record on Appeal, and Defendant-Appellee's Designation of Contents of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District this 12th day of December, A.D. 1956.

[Seal] /s/ STANLEY D. TAYLOR,
Clerk, U. S. District Court, Eastern District of Washington.

[Title of District Court and Cause.]

SUPPLEMENTAL CERTIFICATE OF CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the originals filed in the above-entitled cause:

Complaint.

Summons, General Electric Company.

Motion to Dismiss, American Power & Light Company.

Motion to Dismiss, Electric Bond and Share Company.

Amended Complaint.

Motion to Dismiss Amended Complaint, American Power & Light Co.

Court Reporter's Transcript of Hearing on November 17, 1952, on Motions to Dismiss.

Court Reporter's Transcript of Hearing on September 7, 1955, on Motion to Dismiss.

Opinion of the Court re Motion to Quash Service as to American Power and Light Company.

Notice of Hearing on Motion for leave to serve and file Second Amended Complaint.

Order on Motion for leave to serve and file Second Amended Complaint.

Defendant-Appellee's Supplemental Designation of Contents of Record on Appeal.

and that the same constitute the supplemental record for hearing of the appeal from the judgment of the United States District Court for the Eastern District of Washington, in the United States Court of Appeals for the Ninth Circuit, as called for in Defendant-Appellee's Supplemental Designation of Contents of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District this 27th day of February, A.D. 1957.

[Seal] /s/ STANLEY D. TAYLOR,
Clerk, U. S. District Court, Eastern District of Washington.

[Endorsed]: No. 15395. United States Court of Appeals for the Ninth Circuit. Milton E. Dam and Everett S. Dam, Co-partners Doing Business Under the Firm Name and Style of Dam Brothers, Appellants, vs. General Electric Company a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed December 14, 1956.

Docketed December 24, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
No. 15395

MILTON E. DAM and EVERETT S. DAM, Co-partners Doing Business Under the Firm Name and Style of DAM BROTHERS,

Plaintiffs-Appellants,

vs.

GENERAL ELECTRIC COMPANY, a Foreign Corporation; AMERICAN POWER & LIGHT COMPANY, a Foreign Corporation, and ELECTRIC BOND & SHARE COMPANY, a Foreign Corporation,

Defendants-Respondents.

STATEMENT OF POINTS APPELLANT WILL RELY UPON ON APPEAL

The above-entitled cause having been docketed in the above court on the Plaintiffs'-Appellants' appeal from the District Court of the United States for the Eastern District of Washington, Northern Division, and the appellants having designated the parts of the record they desire incorporated in record on appeal, which is less than the entire record, the appellants submit herewith a Statement of the Points on Which They Intend to Rely on Appeal, to wit:

Point No. I.

Under date of November 5th, 1953, on application of the appellants, they were permitted to serve

and file their Second Amended Complaint herein, and on or about the 25th day of November, 1953, the defendant General Electric Company served and filed motions directed against said Second Amended Complaint, under Rule 12 of the Federal Rules of Civil Procedure, (1) to dismiss, (2) to make the Second Amended Complaint more definite and certain, and (3) to strike parts of said Second Amended Complaint. The defendant-respondent based its claim for dismissal was that the Second Amended Complaint did not state a claim against the defendant on which relief can be granted. The third ground was that the claims asserted therein are void under the Statute of Frauds. The fourth ground was that the claims asserted therein are barred by the Statute of Limitations, and the fifth ground was that the claims asserted therein are barred by reason of Laches on the part of the plaintiffs-appellants.

Under date of May 29th, 1956, the Court rendered and entered its Order "that the Motion of the defendant, General Electric Company to dismiss plaintiffs' Second Amended Complaint is hereby denied, and that the said defendant is allowed twenty days from and after the date of this order in which to answer plaintiffs' Second Amended Complaint," such order being based in part on the determination by the court that under Rule 8(c) of the Federal Rules of Civil Procedure, the defenses of Statute of Frauds, Statute of Limitations, and Laches, must be asserted by way of affirmative defenses in an

answer and cannot be determined by Motion to Dismiss.

Thereafter the defendant General Electric Company served and filed its Answer, setting up as its Fourth and Fifth Affirmative Defenses the statute of frauds, statute of limitations and laches, and in connection with and at the time of such service the defendant served its Motion for Summary Judgment under Rule 56(b) and (c), Federal Rules of Civil Procedure.

Upon the service of such answer, with its affirmative defenses, and the Motion for Summary Judgment, the plaintiffs, under date of July 20th, 1956, served and filed their Motion for Adjournment of Hearing on the Motion for Summary Judgment until the trial of the action under the issues of fact "for the reason and upon the grounds that there are genuine issues of material facts in this case and because of such issues the Court cannot determine, as a matter of law, that the defendant is entitled to Summary Judgment under said Rule 56."

Under date of August 8th, 1956, the Judge of the District Court, on its own motion entered its order, reading, in part, as follows:

> "Now, therefore, plaintiffs' Motion for Adjournment of Hearing on Summary Judgment Motion is ordered stricken, and the Clerk of this Court is directed to strike the same from the files in the above-entitled cause."

Under date of August 27th, 1956, without any further hearing or argument, and without any evidence to support the Fourth Affirmative Defense of the statute of limitations, or the Fifth Affirmative Defense of laches, the trial judge filed its opinion on the motion of the defendant General Electric Company for Summary Judgment and concluded that if the Washington 3-year statute of limitations does not apply, recovery is precluded by laches, and under date of August 29th, 1956, rendered and entered its Order for Summary Judgment, and thereafter rendered and entered its Summary Judgment in favor of the defendant, General Electric Company, from which this appeal is taken.

That the act and actions of the trial Court in summarily and of its own motion refusing to hear or entertain plaintiffs' motion to adjourn the hearing on defendant's motion for Summary Judgment until the trial of the cause upon the issues of fact raised by the pleadings, and particularly under the Fourth and Fifth Affirmative Defenses, and in deciding, without factual support, that Laches applied, or that the statute of limitations had run, has resulted in the abrogation of the Rules applicable to said Court, and particularly Rule 1 of the Federal Rules of Civil Procedure which required the Rules to be construed to secure the just, speedy and inexpensive determination of this action, and as the direct and proximate result of the arbitrary action of the trial Court in summarily and without factual support, finding and determining that plain-

tiffs' Motion to adjourn the hearing on defendant's Motion for Summary Judgment be ordered stricken, and directing the Clerk to strike the same from the files, this appeal has been made necessary, with the resulting delay, expense, and injustice, and to the great prejudice of the plaintiffs-appellants.

Point No. II.

That under the issues raised by the Second Amended Complaint, and which under well-established rules of law and procedure the trial court in determining the Motion to Dismiss or for Summary Judgment must accept as true, and which the trial court did accept as true, as indicated by its Opinion, dated August 27th, 1956, this action is based on a contract, or at least upon an implied, constructive or quasi-contract entered into between the parties to this action, under which the plaintiffs-appellants performed everything required to be performed by them, and as the result of the performance of such contract by the plaintiffs, the defendant has reaped vast benefits, without in any way compensating the plaintiffs-appellants for the results achieved and the benefits reaped by the defendant, whether the relationship of the parties be determined to be that of joint adventurers, partners, constructive or quasi-partners, or some other designation, the relationship created demanded the highest degree of fidelity and loyalty on the part of each and all of the parties, as to such undertaking, and the doctrine of uberrima fides applies to each of the parties to the fullest extent, and the relationship is not ter-

minated prior to the attainment of the objective sought, except by mutual consent, and is not and cannot be terminated by the act, actions or failure of one of the parties, and the statute of limitations or laches does not commence to run until there has been a breach of faith on the part of one of the parties, and until full compensation has been made to the parties performing under the agreement for the benefits received or the unjust enrichment and advantages obtained as the result of such performance by the plaintiffs-appellants.

The decision and determination of the trial court, summarily and without any evidence, and contrary to the facts which the plaintiffs-appellants are, and will be able to produce and establish, determining that the plaintiffs-appellants cause of action is barred by laches and limitation is arbitrary, unjust, inequitable and contrary to principles of justice and equity.

Point No. III.

Neither laches nor the statute of limitations commences to run until the cause of action accrues and the plaintiffs' rights have ripened into a right to sue, and under the pleadings and the facts in this case, neither laches nor the statute of limitations had run against the plaintiffs' claims at the time of the commencement of this action.

Point No. IV.

Neither laches nor the statute of limitations operates in favor of one who has unjustly enriched himself or itself as the result of performance on the

part of the other, and it is unjust and inequitable on the part of the court to summarily grant judgment to the defendant General Electric Company which has been unjustly enriched by the performance of their contractual obligations on the part of the plaintiffs-appellants.

Point No. V.

There are no allegations in the pleadings, nor in the affidavits submitted to the court on defendants' Motion for Summary Judgment from which it can be fixed or determined that the defendant General Electric Company repudiated or abrogated the joint venture agreement and so notified the plaintiffs, nor any basis for determining any time, prior to the commencement of this action, that it was not the purpose and intention of the defendant to complete and comply with the obligations assumed by it under the joint venture agreement, and it was sheer surmise or conjecture on the part of the trial court in its determination that the defendant General Electric Company had been prejudiced by the delay of the plaintiffs-appellants in bringing this action.

Point No. VI.

Whereas, the trial court in its Opinion on which it bases its decision in this case has taken judicial notice of the fact that since the commencement of this action there has been organized the Grant County Public Utility District which has obtained a license to survey the Priest Rapids site for the purpose of constructing a dam or power site at

Priest Rapids, the trial court wholly fails to take judicial notice, also a matter of public record, that since the commencement of this action the defendant General Electric Company, through one of its subsidiary companies, has sold and transferred the fifty-five thousand (55,000) acres of Railroad Grant Lands, and power sites, townsites, industrial sites and terminal site lands acquired through the efforts of the plaintiffs-appellants, Dam Brothers, in the performance of the joint venture agreement, and has distributed to the plaintiffs a portion of the proceeds derived from such sales, clearly indicating that the defendant held this land in trust under the joint venture agreement, and recognizing rights of the plaintiffs under such joint venture agreement.

Dated December 26th, 1956.

PHIPPS & PHIPPS,

By /s/ HARVE H. PHIPPS,

Attorneys for Plaintiffs-Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed January 2, 1957.

[Title of Court of Appeals and Cause.]

STIPULATION REGARDING SUPPLEMENTAL DESIGNATION OF CONTENTS OF RECORD ON APPEAL

It Is Hereby Stipulated by and between the parties to the above-entitled action through their re-

spective counsel that the foregoing Supplemental Designation of Contents of Record on Appeal may be filed and the Clerk is hereby authorized and requested to certify a supplemental record on appeal containing the matters listed in the foregoing supplemental designation and to transmit the same to the United States Court of Appeals for the Ninth Circuit.

It is understood and agreed that in signing this stipulation the plaintiffs do not admit the relevancy or materiality of any of the supplemental data covered by the stipulation, and reserve the right to, at any time, object to all or any part thereof, and that any additional costs or expense entailed by this supplemental addition to the record shall be borne by the defendant.

PHIPPS & PHIPPS,

By /s/ HARVE H. PHIPPS,
Attorneys for Plaintiffs.

HAMBLEN, GILBERT & BROOKE,

By /s/ PHILIP S. BROOKE,
Attorneys for Defendant, General Electric Company.

[Endorsed]: Filed February 15, 1957.